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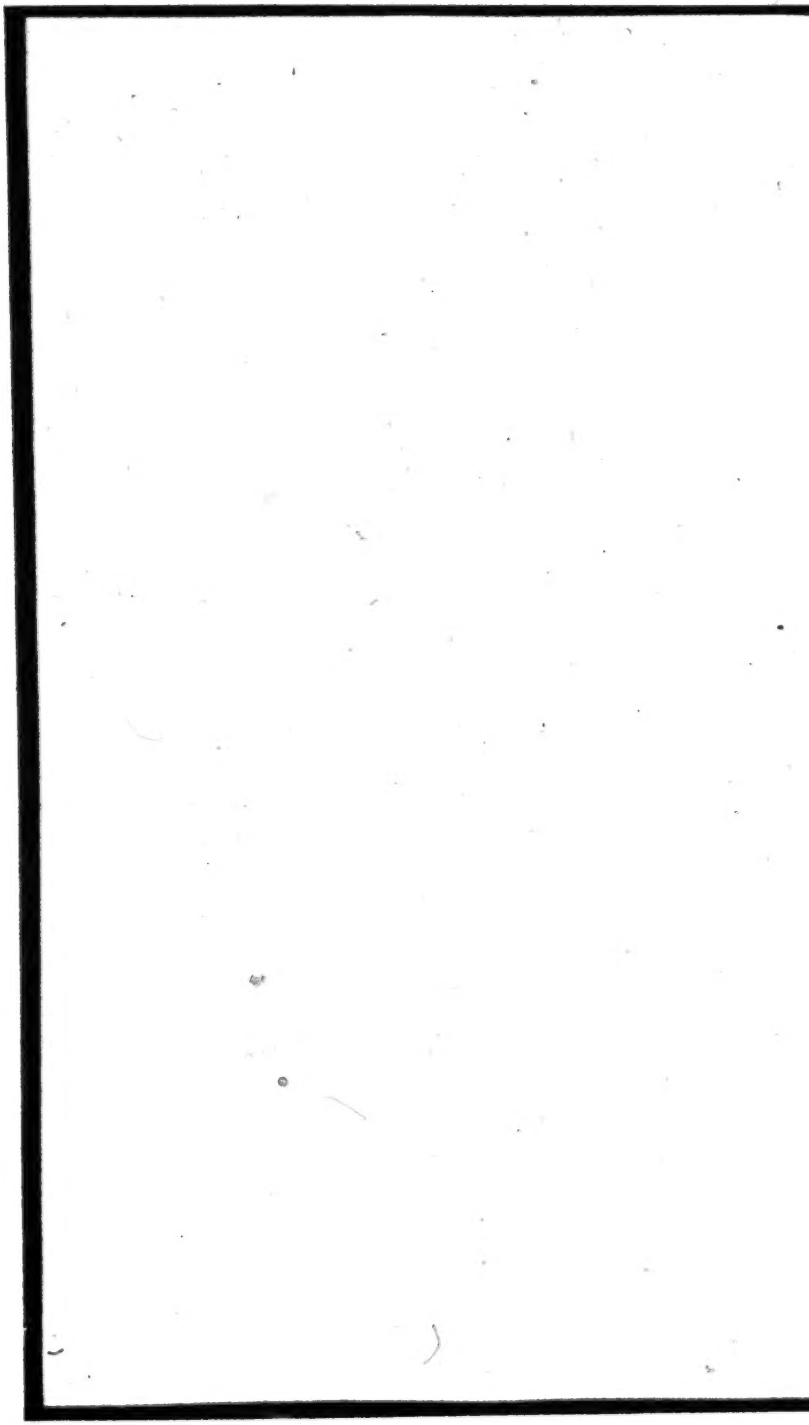

TROOPER R. C. CALDWELL,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Will you state your name please? A. R. C. Caldwell.

Q. You were sworn just a while ago to testify in this case, weren't you? A. Yes, sir.

[535] Q. Where do you live Mr. Caldwell? A. Fredericktown.

Q. Up here in Madison County? A. Yes, sir.

Q. You are with the Missouri State Highway Patrol? A. Yes, sir.

Q. I will ask you, how long have you been with the Patrol? A. Since the 14th day of December, 1942.

Q. Did you go to the Missouri State Penitentiary in September of 1954? A. Yes, sir.

Q. When did you get there sir? A. I got there at twenty-five minutes to eleven on September, the night of September 22nd.

Q. Do you know the Defendant, James William Stidham? A. Yes, sir.

Q. When was the first time you saw him? A. The first time I ever saw him was on the morning of the 27th of September.

Q. Where was that? A. In Death Row, at the Penitentiary.

Q. Now, did you go to Death Row? A. Yes, sir.

Q. Did you take the Defendant anyplace? A. Yes, sir, Patrolman Jenneman of the St. Louis Police Force [536] and myself, took him from Death Row to the field house of the Penitentiary.

Q. Did you go back to his cell to get him? A. I didn't go back to his cell, Patrolman Jenneman and a guard

after he had written the statement out, as to why he would get himself implicated in the murder of somebody that hadn't really done anything to him.

MR. HENNELLY: Object to that Your Honor, and ask that it be stricken and the Jury instructed to disregard it and a mistrial be declared, hearsay and not binding on this Defendant.

THE COURT: Overruled.

Q. Did he answer that statement? A. I asked him the words, I remember, as to whether—

THE COURT: Just state what his statement was.

A. He said that Donnell was a snitch and had snitched on some of the boys and that they had got a load of time out of it, and that I was living my life under a different code than he was living his, and that he respected my code, whether I did his or not.

Q. I believe that is all.

[540] *Recross-Examination by Mr. Hennelly*

Q. Did he say that he was living under a different code? A. Yes, sir.

Q. Did you, by that code, think that he meant that nobody should ever snitch on anybody else? A. I don't know what he meant, that is the words he said.

Q. But he did tell you that the reason Donnell was killed was because he had informed somebody and had snitched on somebody else, is that right? A. He told me that the reason he wanted to kill Donnell was that he was a snitch and that he had snitched on a bunch of the boys and that they had got a load of time out of it.

Q. There isn't any question about the fact that he said that to you, is there Trooper? A. If there was, I wouldn't make the statement.

Q. Nobody hit him and nobody did anything to him and nobody held him from the ceiling, that is true, isn't it? A. Yes, sir.

Q. Nobody did anything like that to him, isn't that right? A. That is right.

Q. Now, Trooper Caldwell, you took him from Death Row, is that correct? A. Yes, sir.

Q. And then you took him over to this shed? A. To the field house.

[541] Q. To the field house? A. Yes, sir.

Q. Did you take him back to Death Row when you were finished questioning him? A. No, sir.

Q. Was he in the same condition when you took him out of Death Row that he was when you left that shed, was he in the same physical condition? A. Yes, sir.

Q. He hadn't shown any evidence had he of any of his fingers being paralyzed as a result of being hung up? A. He didn't show anything like that.

Q. Didn't make any complaint to you about ever being mistreated, or anything like that, did he? A. No, sir.

Q. Nobody had to lay a hand on him, did they, nobody had to hang him up or do anything to him? A. There wasn't anybody that was hung up or beaten up, no, sir.

Q. Now, when you took him back after he had left there Trooper, where was it that you said you took him to? A. You mean from the field house, where we took him to?

Q. Yes, sir. A. After he made this statement?

Q. Yes, sir. [542] A. To O Hall.

Q. O Hall? A. Yes, sir.

Q. And did you place him in a cell there? A. I didn't place him in a cell. He was placed in a cell, but not by me.

Q. Had there been any conversation about the Defendant's wrist watch before he left Death Row? A. Not to my knowledge, no, sir.

Q. Did he have a wrist watch on? A. I don't remember seeing one on him.

Q. Well, did you assist in putting the handcuffs on him? A. He was brought out from his cell by Patrolman Jenneman and one of the guards out to the front and my handcuffs were placed on him, and his hands were handcuffed to the back of him like this.

Q. And did those handcuffs remain on the back of him during all of the oral interrogation? A. Yes, sir.

Q. And where was he in that room during that interrogation? A. Sitting in a chair.

Q. Did he at anytime leave that position at that chair? A. Not that I remember of.

Q. There was no, he made no movements after he once sat down to the best of your knowledge, is that right? A. As far as leaving the chair, I don't remember him leaving [543] the chair.

Q. Was he at a table when he was being interrogated? A. Close to a table similar to that, but he wasn't sitting right up close to it.

Q. No further questions.

MR. RILEY: That is all.

THE COURT: I believe we will recess now for supper. During the evening recess, remember the previous statements of the Court not to talk to anyone or permit anyone to talk to you about it, and don't discuss the case among yourselves or read anything about it or listen to anything about it, and the Sheriff will take you to the hotel for your supper and we will recess until seven or seven-fifteen.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 428) Tuesday, July 19th, 1955, Regular July 1955 Term

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Now at this time, it being supper hour, trial in this cause is recessed for the Supper Recess.

Now, supper recess being over, comes again the parties by their respective counsel, and comes the Jury herein impaneled and sworn to try this cause, and whereupon trial in this cause is resumed and progresses in the hearing of the evidence herein.

[544] THOMAS JENNEMAN,

RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Will you state your name please? A. Thomas Jenneman.

Q. Where are you employed sir? A. St. Louis Police Department.

Q. For how long have you been employed by the St. Louis Police Department? A. Fifteen years ago last December 24th.

Q. How old are you sir? A. Thirty-seven.

Q. I will ask you if you know the Defendant, James William Stidham? A. Yes, sir, I do.

Q. Can you recall when you saw him the first time? A. The morning of the 27th of September.

Q. What year? A. 1954.

Q. And where were you? A. At the Penitentiary.

Q. Where was the first time you saw him? A. In Death Row.

Q. You just tell us what you did and what happened. A. Trooper Caldwell and I, on orders of Lieutenant Eitzman went to Death Row to bring Stidham down to the baseball field [545] athletic shack for questioning concerning the murder of Walter Lee Donnell.

Q. And where did you go to get him? A. Death Row.

Q. Death Row? A. Yes.

Q. And you took him down to the recreation building on the athletic field? A. Yes, sir.

Q. Now, how was he taken down there? A. In the Patrol car, Trooper's car.

Q. And did you take him in the building? A. In the athletic building?

Q. Yes. A. Yes, sir.

Q. Were you there all the time he was there? A. Not all of the time, no, there was a couple of times that I stepped outside.

Q. Now, during the time—I will show you what has been marked as Exhibit 16 and 16-1, and ask you if you ever saw that before? A. Yes, sir. I have.

Q. Now, is your name, does your name appear on that exhibit? A. My initials on the first page and my name on the second.

Q. Were you there when that exhibit was written? A. Yes, sir, I was.

Q. All of it? A. Yes, sir.

[546] Q. Now, I will ask you if you or anyone in your presence who signed that, who wrote that Exhibit— A. Stidham wrote it.

Q. Did he sign it? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. I will ask you if you or anyone in your presence promised Stidham anything to make a statement? A. No, sir.

Q. I will ask you if you or anyone in your presence threatened Stidham? A. No, sir.

Q. Threatened him in any way? A. No, sir.

Q. Strike him? A. No, sir. What did you say, trick him?

Q. No, strike him? A. No, sir.

Q. I said threaten? A. Threaten him, no, sir.

Q. Now, did you or anyone in your presence hit, strike, beat Stidham in any way, or in any manner? A. No, sir.

Q. Did you offer him any violence whatsoever? A. No, sir.

[547] Q. Now, did you tell Stidham what to put in that statement? A. No, sir.

Q. Who was doing the questioning? A. Lieutenant Eitzman and Sergeant Little.

Q. Did you hear them tell him what to put in that statement? A. No, sir.

Q. Did anyone tell him what to put in that statement? A. No, sir.

Q. Did Stidham make any statement other than what is contained in those sheets of paper? A. Made an oral statement before he wrote this.

Q. I will ask you if you can recall anything that he said orally, that isn't in that statement? A. I recall him saying that he had a grudge against Donnell, due to the fact that Donnell snitched on him in July while they were in E Hall.

And that was his reason for being put in Death Row, the snitch was over a riot that was supposed to take place in July.

MR. HENNELLY: I am going to object to that answer and ask that it be stricken and the Jury instructed to disregard it and a mistrial declared, as they are attempting to prove another crime, and it is an attempt to put the reputation of the Defendant in issue.

THE COURT: The objection is overruled.

[548] Q. That is all.

Recross-Examination by Mr. Hennelly

Q. Officer Jenneman, had you been up in the Penitentiary from the night that the riot began? A. Yes, sir.

Q. What time did you arrive up there? A. Early, about five-thirty the morning of the 23rd.

Q. Five-thirty the morning of the 23rd? A. That was Daylight Saving Time, four-thirty Jeff City time.

Q. Did you at that time go down into Death Row? A. No.

Q. Were you in B basement at anytime on the 23rd? A. No, sir.

Q. Now, you are attached to what district in St. Louis? A. Central.

Q. And Lieutenant Eitzman is your commanding officer, or at least one of your commanding officers down there, isn't he? A. Yes, sir.

Q. And these other officers, Billings and what is the name of the other officer that testified here? A. Overbeck.

Q. You are all out of the Central District? [549] A. Yes, sir.

Q. Incidentally, how big a man are you? A. Five foot eleven, one hundred and ninety-five pounds.

Q. One hundred and ninety-five? A. Yes, sir.

Q. Now, are you attached to any particular riot squad or anything in the City of St. Louis? A. No, sir.

Q. I see. Now then, when you came up to—strike that. On the day that this defendant was questioned, you were one of the officers that got him out of his cell in Death Row, am I correct in stating that? A. Yes, sir.

Q. Now, was there any conversation either directly to you, or any conversation in your presence with respect to a wrist watch that the Defendant had on? A. No, sir.

Q. There was none? A. No, sir.

Q. Did he have a wrist watch on when you first got back to his cell? A. When I first went to get him?

Q. Yes. A. I saw no wrist watch.

Q. Did you go to his cell? A. Went to the door of his cell.

[550] Q. And at the time that you went to the door of his cell, was he laying down on the floor or standing

up or where was he? A. Well, I don't recall whether he was laying down or standing up.

Q. And did you have some conversation with him then? A. I called him.

Q. Did you tell him you were going to take him over to the athletic shed? A. Didn't tell him where, said come along.

Q. Didn't tell him where he was going, is that right? A. No, sir.

Q. Did you stop at anytime in that classification room and raise him up off of the floor? A. No.

Q. Didn't do that, did you? A. No, sir.

Q. This time he was questioned over in the athletic shed, is that right? A. I don't know of any other time that he was questioned.

Q. All right. And can you tell me where these handcuffs were put on? A. You mean what part of his body?

Q. Yes. A. On his hands, and his hands were behind his back.

[551] Q. His hands were behind his back? A. Yes, sir.

Q. And then he was taken out of Death Row and put into one of the cars and taken some distance to this shack, is that right? A. He was taken out of his cell there shortly, or rather a small distance from his cell door is a cage, there is a walkway there, and he was brought up to the front gate of Death Row and there the handcuffs were put on him.

Q. There the handcuffs were put on him? A. Yes, sir.

Q. Now, when you took him in, did you take him in a car over to the athletic field? A. Yes, sir.

Q. Can you give His Honor and this Jury any idea of how far you had to drive to get him over there? A. From the Death Row cell?

Q. Yes, from the time you got into the car and you drove him over to the athletic shed? A. I would say perhaps close to a quarter or half a mile.

Q. Between a quarter and half a mile? A. Yes, sir.

Q. You know how close the Administration Building is to Death Row? A. No, sir.

[552] Q. You don't? A. No, sir.

Q. But you took him between a quarter and half a mile down there to question him, is that correct? A. Yes, sir.

Q. Now then, when he got down there and as he was sitting in the car, he was still handcuffed with his hands behind him, is that right? A. Yes, sir.

Q. Did either you or Trooper Caldwell have any shotguns with you or pistols when you went up there? A. I had a riot gun.

Q. You had a riot gun? A. And my sidearms.

Q. And your sidearms? A. Yes, sir.

Q. And with all that, you still handcuffed him to the back, is that right? A. Yes, sir.

Q. And then you taken him down there, and when he got in there, were there some officers in that room already? A. Yes, sir.

Q. And tell us if you will, where were they in that room? A. Seated at a table, and Lieutenant Eitzman was, I don't recall if he was seated at a table or standing behind it, and Sergeant Little was seated at the side of the table, and [553] I don't recall just where Overbeck or Billings were, but they were in the room, whether they were seated or standing I don't remember.

Q. Now then, do you, were you there for the first part or all of the questioning Officer? A. When we first went in it was a pretty hot day, and I stepped over to a fan that was there, and I was fairly close to the fan. Shortly afterwards I had to step outside, due to a severe cough that I had, and I was outside for a few minutes.

Q. You say that it was a pretty hot day, this was September, you say September 27th, is that right? A. Yes, sir.

Q. Was it, was the sun shining? A. Yes, sir.

Q. And would you say it was real hot? A. It was hot enough to where we were instructed by the Captain of the St. Louis Police Department to remove our blouses and go around in shirt sleeves.

Q. All right. Were you there while he was questioned at all in the beginning Officer? A. As I said, when we first went into the room with him, I stepped over to this fan, and shortly afterwards I stepped outside, due to a severe cough, which I had spent fourteen days in the hospital because of.

[554] Q. Did you come back in again? A. Yes, sir.

Q. And was he questioned then in your presence? A. Yes.

Q. And during that time Officer, did he deny that he had anything to do with the death of Donnell? A. I don't recall anytime that he denied it, when I was in there.

Q. You don't recall that? A. No, sir.

Q. You know how long you were gone outside of the room? A. Perhaps close to ten minutes.

Q. Close to ten minutes? A. Yes, sir.

Q. When you came back in, did you stand up close to the position where he was being interrogated by the officers? A. I stood to his left, rather, I went over and sat on a bench to his left against the wall.

Q. How far would you have been away from the Defendant at that time? A. Approximately four feet.

Q. Four feet? A. Yes, sir.

Q. But at no time did you hear him deny that he had anything to do with the murder? A. Not while I was in the room.

[555] Q. Not while you were there? A. No, sir.

Q. Now was he admitting then when you were there that he had something to do with the murder? A. Not right at that moment, no.

Q. All right. Now, is it your testimony that nobody hit him, nobody did anything to him, isn't that right? A. In my presence the man was never injured or struck in any way.

Q. And—

THE COURT: Let the witness answer, he was answering, go ahead and complete your answer. What were you saying?

A. In my presence the man was never touched and never injured and never threatened in any way.

Q. All right. Was he at anytime taken and lifted up to the ceiling, rather lifted a few inches from the ground with a rope which was attached to the handcuffs to the back? A. No, sir.

Q. That wasn't done was it? A. No, sir.

Q. Did you leave that room at anytime after that first time that you went outside? A. No, sir.

Q. And did he complain of any pain in his hands? A. No, sir.

[556] Q. Could you see his hands? A. See both of them.

Q. And there was nothing wrong with the hands when you saw them, is that right? A. Not that I could see, no, sir.

Q. You didn't see any shrinking of the little finger and the next finger on the left hand, did you? A. I did not observe anything like that.

Q. All right. Now then, how long was he in there before he made a signed statement? A. I would say approximately twenty-five minutes or a little longer.

Q. Twenty-five minutes? A. Yes, sir.

Q. Now, was he still in the same position when the statement was reduced to writing as he had been in when he was making the oral statement? A. No, when he started writing, the handcuffs were removed.

Q. And did he remain in the same chair and in the same position? A. Same chair, but not the same position, no.

Q. All right. Now, at that time, were you all seated around the table? A. Not all of us, no.

Q. Did anybody tell him anything to put in that statement? [557] A. No, sir.

Q. Nothing at all, is that right? A. He was instructed to state what his name was and his age.

Q. His name and his age? A. And that he was an inmate of the Penitentiary.

Q. You were there, you were right there, weren't you? A. Yes, sir.

Q. And he was instructed to give his name and his age and that he was an inmate of the Penitentiary? A. Yes, sir.

Q. Now, is that the only thing that anybody said to him that was at that table during this interrogation, is that the only thing that anyone said to him? A. Is that the only thing anyone said to him?

Q. Yes, is that the only directions given to him with regard to writing the statement? A. Yes.

Q. The only thing? A. Yes.

Q. No question about that now, is there Officer? A. I don't recall anything else that was said.

Q. Now, how long would you say it took him to write the thing out? A. I would say possibly around fifteen or twenty minutes.

[558] Q. Fifteen or twenty minutes? A. Yes, sir.

Q. Now, after he got finished, did you put the handcuffs on him again? A. I don't believe we put them on immediately, no.

Q. Did you put them on him after you got him outside? A. We put them on to take him back to O Hall, where we took him.

Q. You didn't take him back to where you got him, did you? A. No.

Q. Were there at the time you went to Death Row and got him, were there some other men celled in Death Row? A. Yes.

Q. When you took him back down to O Hall, who was with you at that time? A. Trooper Caldwell.

Q. Sir? A. Trooper Caldwell.

Q. Trooper Caldwell? A. Yes, sir.

Q. Was that the last time that you saw the Defendant Stidham? A. No.

Q. Did you question him at any time after that? A. No, I didn't question him.

Q. I am sorry. Did you hear anybody else question him after that? [559] A. No, sir.

Q. Did you see him down in the hospital down in Springfield, Missouri? A. No, sir.

Q. You—did you go down there Officer? A. No, sir.

Q. No further questions Your Honor.

MR. RILEY: I believe that is all. Call Officer Billings.

CHARLES BILLINGS,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Will you state your name please? A. Charles Billings.

Q. You have been previously sworn, haven't you? A. Yes, sir.

Q. And how old are you Mr. Billings? A. Thirty-five.

Q. By whom are you employed? A. St. Louis Metropolitan Police Department.

Q. How long have you been Officer? A. Eleven years.

Q. Are you acquainted with the Defendant, James William Stidham? A. Yes.

Q. I will show you what has been marked as State's Exhibit 16 [560] and 16-1. Have you seen that instrument before? A. Yes, sir.

Q. Do you know what it is? A. Yes, sir.

Q. Did you sign it? A. Yes, sir.

Q. Did you sign both pages? A. I initialed the one page and signed the other.

Q. And were you present when that instrument was written? A. Yes, sir.

Q. Who wrote it? A. James Stidham.

Q. And did he sign it? A. Yes, sir.

Q. Were you present when he signed it? A. Yes, sir.

Q. Where did this occur? A. In the field house at the Penitentiary.

Q. Were you there when Stidham was brought in? A. Yes, sir.

Q. Were you there all the time? A. Yes, sir.

Q. Were you there when he left? A. Yes, sir.

Q. And I will ask you if at anytime you or anyone else made [561] any promises to Stidham to get him to sign this statement or make it? A. No, sir.

Q. I will ask you if you or anyone else in your presence threatened Stidham in order to get him to make this statement? A. No, sir.

Q. I will ask you if you or anyone else hit, beat, struck Stidham with anything, hands, fists, clubs or anything? A. No, sir.

Q. Did you offer him any violence whatsoever? A. No.

Q. Did he write this statement out in his own handwriting? A. Yes, sir.

Q. And did you or anyone there tell him what to put in it? A. No, sir.

Q. Prior to making this statement, did you hear Stidham make an oral statement? A. Yes, sir.

Q. And I will ask you if you can recall anything that Stidham said regarding Walter Lee Donnell, and confine it to Donnell, if he made any statement regarding Walter Lee Donnell, that isn't in that written statement. A. He said in his oral statement that Donnell had snitched on him several months prior, and when they attempted another riot, and that is why he was in Death Row.

[562] MR. HENNELLY: Same objection, if Your Honor please.

THE COURT: Same ruling.

MR. RILEY: That is all.

Recross-Examination by Mr. Hennelly

Q. Officer, you are also out of the Central District, downtown district in St. Louis, aren't you? A. Yes, sir.

Q. And there is of course a Police Department rule against beating any prisoner, isn't there? A. Yes, sir.

Q. And there is also, to your knowledge, there is also a Federal Statute against beating any prisoner, isn't there? A. Yes, sir.

Q. All right. Now then, so let me ask you, none of you, there was no beating done in your presence or no beating done by you, was there? A. No, sir.

Q. Now then, I am going to ask you Officer, at the time that Stidham first got there into that cellar, I am sorry, into that shed, it was a shed, wasn't it? A. It was a field house. It wasn't what I call a shed, no.

Q. How many rooms in that place? A. Oh, the only room we were in was one big room.

[563] Q. All right. And can you give His Honor and the Jury the dimensions of that room? A. Oh, about twenty by thirty, thirty-five feet.

Q. And when he first came in there, were you all standing or sitting around the table, or what were you all doing? A. Standing and sitting.

Q. I see. And he was manacled at that time, was he? A. Yes, sir.

Q. And did he have a coat on? A. No, sir.

Q. Was he at anytime in your presence placed in a chair, and a coat put around him? A. No, sir.

Q. Did anybody hit him with any sticks? A. No, sir.

Q. You have to answer sir, so the gentleman can get it. A. I said no, sir.

Q. Were there any sticks in that building which could be used for cork ball games, did you see any of those around there? A. There were bats in the place.

Q. Bats? A. There was the sporting, sports office.

Q. Did anybody take any of those bats, or any of that sporting equipment and make use, fool around with it in front [564] of Stidham? A. No, sir.

Q. Didn't do that? A. No.

Q. When Stidham was first questioned, did he deny having anything at all to do with the death of Walter Lee Donnell? A. When he was first questioned.

Q. How long did he persist in that position Officer? A. Oh, about twenty to twenty-five minutes.

Q. Now, I am going to ask you if at that time he was taken and hung up with his hands in back of him and suspended six or eight inches from the ground, with his feet six or eight inches off of the ground? A. No.

Q. That is not true? A. No, sir.

Q. All right. But in any event, nobody did anything to him, did they? A. No, sir.

Q. But he then admitted that he had something to do with it, is that right? A. Yes, sir.

Q. That is when he made an oral statement? A. Yes, sir.

Q. Did anybody have to do anything at all to him in a physical way? [565] A. Not in a physical way, no, sir.

Q. Now then, I will ask you Officer, how long did the oral interrogation take? A. Oh, another twenty-five minutes to half an hour.

Q. Twenty-five minutes to half an hour? A. Yes, sir, or less maybe. I mean, I wouldn't say for sure, but I would say it was twenty or twenty-five minutes.

Q. Let me ask you this, have you St. Louis Officers discussed this thing between yourselves at anytime? A. We have discussed the case.

Q. All right. I will ask you this, did anybody tell the Defendant what to write into that statement? A. No, sir.

Q. Nobody told him anything? A. No, sir.

Q. No further questions.

MR. RILEY: I believe that is all.

MR. RILEY: At this time the State offers State's Exhibit 16 and 16-1.

MR. HENNELLY: The Defendant will object and except to the introduction of State's Exhibit 16 and 16-1 for the reason that it is hearsay, for the reason that it was taken in violation of the Constitutional Rights of this Defendant, under both the State Constitution and the Federal Constitution and for the reason that at the time it was taken this Defendant [566] had been in custody, both actual and technical custody, being an inmate of the Missouri State Penitentiary, and being manacled and being handcuffed, and for the reason that a proper foundation has not been laid for its introduction and to introduce it under these circumstances and with the evidence so far adduced, would be a violation of all of the Constitutional Rights of this Defendant.

THE COURT: The objection is overruled. Now then, I suggest that the statement be read to the Jury.

MR. RILEY: Can I read it?

THE COURT: I was going to add further, that it then be shown to the Jury, but that it be read. I don't see much point in letting each member of the Jury have to read it through its entirety. I think if it is read to the Jury at this time, and then passed to the Jury, that will be sufficient.

(Out of the hearing of the Jury)

MR. RILEY: At this time, before I read the Exhibit to the Jury, I will ask counsel for the Defendant if he wants to interpose an objection to that part of the statement which refers to the sentence, which sentence he is now serving, and the fact that he has two prior convictions.

THE COURT: Three previous convictions is the way it is written here.

MR. HENNELLY: I am objecting to the entire Exhibit Your Honor, but I am certainly objecting to that section. I think that it [567] is putting his character and reputation of the Defendant in issue prior to the time that he

takes the stand, but I am objecting to the whole statement, and I had included that in it Your Honor.

THE COURT: Well, in view then of the objection of that particular part as far as the introduction of Exhibit 16 and 16-1, the objection as to the Exhibit being received in evidence, is overruled, but as to that particular part, I think, following the word "Penitentiary" in the fourth line, the Court will strike out for the reading and exhibiting to the Jury, the following words, "serving a sentence of twenty-five years for armed robbery", and then that looks like a comma, "I have three previous convictions of and then it looks like either a semi-colon or a comma, there is some other punctuation after that now, I think that would be the part that should not be read to the Jury. Now in passing that to the Jury, I think possibly a piece of paper could be cut and with scotch tape could be pasted over that.

MR. RILEY: I believe it would be better to use a piece of paper. The scotch tape could be taken off and the statement wouldn't be destroyed as it now is.

THE COURT: If you paste a piece of paper on it, it would be, the possibility would be that you would never be able to remove it.

MR. REX HENSON: I will take care of it Judge.

[568] THE COURT: I want to complete this record, the statement, that is the part of the statement that is affected by this ruling of the Court now reads, "My name is James William Stidham. I am Twenty-five years of age. I am from Kansas City, Missouri, I am at the present time an inmate of the Missouri State Penitentiary serving a sentence of twenty-five years for armed robbery. I have three previous convictions of Dyer Act at the time of the riot in the Missouri State Penitentiary on September 22nd, 1954. I was confined in Cell 23 of Death Row at 6:50 P.M."

MR. HENNELLY: That is the part you are taking out, aren't you Judge?

THE COURT: And then it continues on, but I am taking out that part, the wording, "serving a sentence of twenty-five year for armed robbery. I have three previous convictions of Dyer Act." That is where the end of that is.

MR. HENNELLY: You are not going to cut it out of the statement are you?

THE COURT: No, he is going to put a piece of paper over it and put that on there with scotch tape because you can see through the scotch tape, to read any of the rest of it. I think I will state to the Jury that certain parts of it are taken out. I don't want to tell them any reason why it is out or any of that kind of comment.

MR. HENNELLY: May the record show now that the Exhibit 16 and [569] 16-1, being in its present form, with the sections deleted which the Court stated it was ordering deleted, that Defendant still objects to its introduction for the reasons which I have heretofore stated, that it is hearsay, that it was taken in violation of the Constitutional Rights under both the Federal and State Constitutions, and that no proper foundation has been laid for its introduction in its present form.

THE COURT: You are not objecting to the fact we deleted some of it, that don't contain the full statement, because you objected, that is the reason I sustained that part of the objection.

MR. HENNELLY: I don't think I can in good confidence do such a thing.

THE COURT: The objection to the introduction as deleted is noted and overruled. Gentlemen of the Jury, the attorney for the State will now read to you Exhibit 16 and 16-1, and I want to mention to the Jury the fact that there is some scotch tape on this Exhibit and a portion of it has been ruled out by the Court and that accounts for

the scotch tape that is on it. It will be, after it has been read, it will be passed to you for your inspection, but that part has not been received in evidence, and only such part as you can see, and as the Prosecuting Attorney can now read, are received in evidence for your consideration. [570] By saying this, the Court isn't and doesn't intend to give to the Exhibit any undue inference or to intimate what the Court thinks of it. It is evidence in the case and is received in evidence and is now for your consideration as it now stands.

Exhibit 16 and 16-1, having been received in evidence read in words and figures as follows:

James William Stidham September 27, 1954

My name is James William Stidham I am Twenty-five years of age, I am from Kansas City, Missouri. I am at the present time an inmate of the Missouri State Penitentiary. At the time of the riot in the Missouri State Penitentiary on September 22, 1954, I was confined in Cell 23 in Death Row. At 6:50 P.M. on the above date I heard very loud noises, pounding, hollering, etc., and as a result thereof several rioting prisoners broke in Death Row, and Paul Kenton unlocked my door whereupon I came out of the cell, then myself and several other prisoners went to Crayton's cell with the purpose of attacking him but he had his door lock blocked and we could not enter. After we left Crayton's cell I saw that Donald's cell had been open, and someone said lets get Donald, so we went in. Besides myself in Donald's cell, I know that Paul Kenton, Laster, Thompson, Linder, were also in the cell. I heard an exchange of words between two guys referring to each other as Thompson and Linder. Kenton held Donald while Laster [571] stabbed him several times with a ice pick, at the same time I slashed at him three or four times around the face and neck with a knife that Kenton gave me when he opened

the door, when Donald fell to the floor Linder and Thompson each said get Donald with the sledge and they proceeded to hit him with a sledge hammer and crow bar; During this time someone was holding a flashlight that Kenton previously had. When we left the cell Donald was lying on his back with his head pointed toward the door. The knife I had was a regular kitchen knife about six or seven inches in length, when I got back upstairs in B Hall, I threw the knife on the floor near the west end on the south side of the building.

P.R.L. W.E. T.J. C.B. R.C.C. E. O.

Exhibit 16
LWE
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James William Stidham

Page 2

For the remainder of the night I just roamed around the cell block until the riot ended.

/s/ James William Stidham
September 27, 1954
12:35 P.M.

Witnesses:

/s/ Lt. Walter Eitzman
/s/ P. R. Little, Mo. S.H.P.
/s/ Ptn. Elmer Overbeck
/s/ Ptn. Charles Billings
/s/ Pat'n. Thomas Jenneman
/s/ R. C. Caldwell

[572] Exhibit 16-1
LWE
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THE COURT: Now Gentlemen, the Exhibit which has just been read to you, which has been received in evi-

dence, may now be passed among yourselves, and any Juror that wishes to read it in its entirety may do so. I had the Prosecuting Attorney read it so that it might save some time. If you just want to look at it and examine it, or make any inspection that you wish, why you may do so.

MR. HENNELLY: May the record show that I am now asking the Court to strike all of that from the record which counsel read, the reading of the statement, and instruct the Jury to disregard it, and declare a mistrial.

THE COURT: Overruled.

MR. RILEY: State rests.

MR. HENNELLY: At the close of the State's case, the Defendant moves the Court to instruct the Jury to return a judgment of acquittal, especially to murder in the first degree, for the reason that under the evidence in the case, the State has failed to show that the burden of the proof, especially with respect to murder in the first degree.

THE COURT: Are you just dictating that into the record?

MR. HENNELLY: I am Judge, and I am going to make another one Your Honor, a general motion for a judgment of acquittal. [573] Comes now the Defendant at the close of the State's case, and moves the Court to instruct the Jury to return a judgment of acquittal.

THE COURT: All right, the motion for reduction of the crime from first degree is overruled, and the motion for acquittal is overruled, at the close of the State's Case. The record may note that the Defendant objects and excepts to the ruling of the Court.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 428) Tuesday, July 19th 1955, Regular July 1955 Term

Now at this time, comes the defendant herein, by counsel and offers Motion for Acquittal of Murder in the First Degree at the close of State's Case, which is refused and overruled. Defendant objects and excepts, and continues to object and except to the ruling of the court.

And thereafter, to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 428) Tuesday, July 19th, 1955, Regular July 1955 Term

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Now comes the defendant herein, by counsel and offers [574] Motion for Acquittal which is refused and overruled by the Court. Defendant objects and excepts to the ruling of the Court, and continues to object and except.

MR. HENNELLY: Let me put on the guy from the Bureau of Vital Statistics with the Death Certificate, and I intend to put on the woman from the hospital secondly. At the time she gets ready to go on, if you have got some objection to it, I will make an offer of proof, and let me get rid of her. I take the position that it is admissible, and that it is a Jury question, notwithstanding the fact that I submitted it to the Court at first in order for the Court to determine, and whatever the Court says, of course, will be done

THE COURT: Call whoever you wish to and I will rule on them as I come to them.

CLYDE BRIDGER,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Hennelly

Q. What is your name, please? A. Clyde A. Bridger.

Q. How do you spell your last name, sir? A. B-r-i-d-g-e-r.

Q. Sir, what is your occupation, or profession? A. State Registrar of Vital Statistics.

[575] Q. And how long have you been in that position, sir? A. Six years.

Q. And what are your duties in that position? A. To file the original records, birth records, stillbirths or death, permanent records.

Q. Have you a subpoena duces tecum which His Honor issued to produce in His Honor's Court the official records with respect to the Death Certificate of one Walter Lee Donnell? A. I have.

Q. Is it with you now at this time? A. It is.

Q. Mark it Exhibit F.

Reporter marked Exhibit F, a Death Certificate.

Q. Let me ask you this, when were you served with a subpoena in this case? A. On the morning of July 14th.

Q. On the morning of July 14th? A. Yes, sir, that is correct.

Q. I will hand you now what has been marked for the purpose of identification as Defendant's Exhibit F, and I will ask you what that is? A. That is a standard Certificate of Death of the original Death Certificate.

Q. Of who? A. Walter Lee Donnell.

Q. Are you the keeper of those records, sir? [576] A. Yes, I am the keeper of that record.

Q. And it is kept in the normal course of business and under your custody and control, is that correct? A. Yes, sir.

Q. At this time the Defendant will offer into evidence if Your Honor please, Defendant's Exhibit F.

MR. RILEY: No objection.

THE COURT: Is that, let me ask the witness, is that an original record, is that the only one that is on file?

A. That is the only original record on file, a duplicate is kept by a local officer under my jurisdiction.

THE COURT: What I was wondering, if there was something that could be agreed upon, as a photostat that could be substituted for the original.

MR. RILEY: Isn't this a photostat? A. This is the original.

MR. HENNELLY: He can send a photostat down.

A. I can supply a photostat Your Honor, I can supply a photostat in any quantity that you need.

THE COURT: Could we keep this until tomorrow? A. No.

THE COURT: There is a man here who can photostat it. I thought you had it there.

MR. HENNELLY: This has been changed Your Honor.

A. No, this is the one before it was changed.

[577] THE COURT: Here is a photostatic copy with your certificate on it.

A. Yes, sir, that is correct. Let me look at it one minute and see if everything I have got here is clearly—

THE COURT: Do you want to compare it?

MR. HENNELLY: Yes, I would like to.

THE COURT: Can it, inasmuch as the witness has identified the photostat, can it be agreed that same be marked Exhibit FF, and used for the purposes of the exhibits of the original in this case?

MR. RILEY: Yes.

THE COURT: Inasmuch as Exhibit F is a part of the permanent files of the State of Missouri.

Reporter marked Exhibit FF, photostat of Exhibit F.

Reporter marked Exhibit G, Death Certificate.

Q. Now, I want you to refer, if you will sir, to State's Exhibit FF, which may the record reflect FF, as well as F has been accepted in evidence?

THE COURT: He is looking at both of them and we are going to use Exhibit FF, for the purpose of introduction in this case.

MR. HENNELLY: Now, referring to State's Exhibit FF, can you tell me when that was originally filed?

A. Yes, sir, originally filed in my office on September 27th, 1954.

[578] Q. Now, was that Exhibit later amended? A. Yes, sir, it was.

Q. And when was it amended? A. On July 15, 1955.

Q. Would you, could you identify the record as it existed, a photostatic copy of the record as it existed prior to the time that it was amended? A. Yes, sir, I can.

Q. I will hand you what has been marked for the purpose of identification, as Defendant's Exhibit G, and I will ask you whether or not that is the—or was the official record prior to the time that it was amended? A. This is a certified photostatic copy of the original record before it was amended.

Q. Was that record kept in the normal course of business? A. Yes, sir, the original was.

Q. And under your custody and control? A. Yes, sir.

Q. You will certify that was the original record at the time you were served with a subpoena duces tecum on September 14th? A. Yes, sir.

Q. I will offer this first in evidence, Your Honor.

MR. RILEY: I don't have any objection.

THE COURT: All right, this may be received in evidence, that [579] is Exhibit FF, and Exhibit G.

Exhibit FF, having been received in evidence, and the Reporter not being furnished a photostatic copy of same at the time of the preparation of this transcript, for that reason same is not copied into this record.

Exhibit G, having been received in evidence, reads in words and figures as follows:

THE DIVISION OF HEALTH OF MISSOURI
STANDARD CERTIFICATE OF DEATH

FILED SEP 27 1954 State File No. 30116

Reg. Dist. No. 77 Primary Reg. Dist. No. 3016
Registrar's No. 251

1. Place of Death
   a. County—Cole
   b. City—Jefferson City
   c. Length of stay (in this place) 3 yrs.
   d. Full name of Hospital or Institution—State Penitentiary
2. Usual Residence
   a. State—Tennessee
   b. County—Unknown
   c. City or Town—Brentwood
   d. Street Address—RR#1
3. Name of Deceased—Walter Lee Donnell
4. Date of Death—September 22, 1954
5. Sex—Male

6. Color or race—white

7. Married.

8. Date of birth—February 20, 1924

9. Age— 30 7mo. 2days.

10. Usual occupation—truck driver

10b. Kind of business—unknown

[580] 11. Birthplace—unknown

12. Citizen of what country—U.S.

13a. Father's name—unknown

13b. Mother's maiden name—unknown

14. Name of husband or wife—(wife) Margaret L. Donnell

15. Was deceased ever in U. S. Armed Forces? Unknown

16. Social Security No.—Unknown

17. Informant name—State Penitentiary Hospital Records

18. Cause of Death

1. Disease or condition directly leading to Death—By bullet wounds of gun in unknown hands

19b. Major findings of operation - - - E981x

22. I hereby certify that I attended the deceased from ..... 19....., to ....., 19....., that I last saw the deceased alive on ....., 19....., and that death occurred at ? P.M. from the causes and on the date stated above.

23a. Signature—/s/ Ben S. Markway, Sheriff Cole County

23b. Address—Box 426 Jefferson City, Mo.

23c. Date signed—9-23-54

24a. Burial, Cremation, Removal—Removal

24. Date—September 24, 1954

24c. Name of cemetery or crematory—National Cemetery

24d. Location—Nashville, Tenn.

Date Rec'd by Local Reg.—Sept. 23-1954.

Registrar's Signature—/s/ R. P. Dorris M.D. N.R.

25. Funeral Director's Signature—/s/ Sylvester Dulle J.D., Mo.

THIS IS A CERTIFIED COPY OF AN ORIGINAL DOCUMENT

[581] State of Missouri)
) ss.
City of Jefferson)

I HEREBY CERTIFY that the above is an exact photostatic reproduction of the certificate for the person named therein as it now appears in the permanent records of the Department of Public Health & Welfare of Missouri. Witness my hand as State Registrar of Vital Statistics and the Seal of the Division of Health of said Department this date of July 11, 1955.

/s/ Clyde A. Bridger,
State Registrar of Vital Statistics

(Seal)

Exhibit G,
LWE
7/19/55

Q. Now, I want you to refer to State's Exhibit, Defendant's Exhibit G, and under cause of death, will you

read please what was the cause of death? A. By bullet wound of gun in unknown hands.

Q. And that is the official record of the Death Certificate of Walter Lee Donnell? A. At that time, yes.

Q. Now then, if you will please, would you look at FF and tell us what the amended record shows? A. The amended record now shows, injuries multiple, extreme stab wounds in heart and lung, brain, trauma and crushing injury [582] of skull, autopsy, yes. Item 28 reads homicide. Item 21 reads, September 22nd, 1954. Item 21, by parties unknown.

Q. By parties unknown? A. Yes, sir.

Q. And I will ask you whether or not you didn't—strike that. Do you know who it was that caused the amendment of that record? A. Only by nature of a telephone call.

Q. And did you recognize the voice? A. No. I presumed that I knew.

Q. Well, I don't think it would be admissible. I think it would be hearsay. I have no further questions at this time.

Cross-Examination by Mr. Riley

Q. Mr. Pritchard— A. My name is Bridger.

Q. Pardon me. Why was the, do you have any information there attached to that exhibit showing why the Death Certificate was changed or amended? A. You mean the type of evidence that was presented?

Q. Yes. A. It was presented in the form of an affidavit.

Q. And whose affidavit was that? A. Ben S. Markway, Sheriff of Cole County, Missouri.

[583] Q. Now, who signed the original certificate? A. Ben S. Markway, Sheriff of Cole County.

Q. And does your office permit Death Certificates to be corrected? A. Yes, sir, it does.

Q. And only if the party making the Death Certificate submits an affidavit? A. That has been the custom before I ever came there and I have followed it since.

Q. Anybody who makes an original certificate and then submits an affidavit under oath, why you permit those certificates to be corrected? A. That is correct.

Q. And you make the corrections in your office? A. Yes, sir.

Q. And this certificate here was corrected? A. That is correct.

Q. The first certificate shows that, doesn't show that an autopsy was performed, does it? A. May I refer to Exhibit G?

Q. Yes, Exhibit G. A. No.

Q. The second certificate as corrected, shows that an autopsy was performed? A. FF does show such.

[584] Q. That is all.

Redirect Examination by Mr. Hennelly

Q. You testified last week in the Kenton case, didn't you? A. I did not.

Q. Was the record seen in the Kenton case, to your knowledge? A. No.

Q. It was not? A. Not the original record.

Q. Was the photostatic copy sent? A. Yes, I am pretty sure it was.

Q. The photostatic copy was sent? A. I think so.

Q. And after that time, the record was changed, isn't that correct? A. That is my understanding. Let me put it that way.

Q. No further questions.

MR. RILEY: That is all.

THE COURT: These have been received in evidence. Do you wish to show them to the Jury?

MR. HENNELLY: May they be passed to the Jury?

THE COURT: Yes.

MR. HENNELLY: I have no further questions.

MR. RILEY: That is all.

THE COURT: (Out of the hearing of the Jury) The record can show that we have been discussing here for a moment the [585] matter of the reception or the introduction into evidence of the record of State Hospital No. 1, which has been previously testified to by the witness, Mrs. Alma Miller. The file folder was marked as Exhibit B, as an exhibit for the Defendant, and another portion thereof was marked Exhibit C, and Exhibit C-1, being two pages of the same report, and which is entitled, Re: James Creighton, C-r-e-i-g-h-t-o-n No. W4266, April 14, 1954, and starts out, Social Data, and Exhibit B, a part of said file entitled, Confidential: For Professional Use Only. This Exhibit, together with Exhibits 14 and 15, letters from said file have previously been identified by the aforesaid witness as part of the record of the file of James Creighton, in the Missouri State Hospital No. 1 at Fulton, Missouri. And the Court has suggested and intimated his feeling that these records are subject to objection and should not be received in evidence, and is suggesting to counsel that inasmuch as they have already been identified, all that would be necessary at this time would be merely the offering of these Exhibits into evidence by counsel. That the only purpose of calling Mrs. Miller to the stand would be to identify, and just merely reiterate what she has already testified to. Now, I think the record should further show that if counsel for the Defendant accepts this method of offering that he has not and is not waiving any of his right relative to the offering of this Exhibit, by [586] not reputting this

witness on the stand, and certainly I don't want to preclude you from calling her to the stand and making an effort to identify them, but it seems to me like it would be just a waste of time to further identify what she has already identified. If you will just make your offer and then the State can make their objection, and then the Court can rule upon those objections.

MR. HENNELLY: Defendant offers into evidence, and I might say that the Court has already accepted into evidence only for the purpose of passing upon the original—

THE COURT: The question of the competence of the witness Creighton to testify.

MR. HENNELLY: That is right, and the Court indicated to counsel that if counsel wanted to submit them at a later time, that counsel would have to re-submit them.

THE COURT: Re-offer them.

MR. HENNELLY: Re-offer them. If I want to read them to the Jury.

THE COURT: And I believe that photostatic copies of these may be sent down by this witness to take the place of those exhibits in the record, in the event that the record is transcribed.

MR. HENNELLY: Yes, under those circumstances, the Defendant will offer into evidence, Defendant's Exhibits C and C-1, and Exhibit D, Defendant's Exhibit D.

[587] MR. RILEY: At this time the State objects to the introduction of Exhibits C and C-1, for the reason that the witness who has identified this has stated that she does not know who prepared this Exhibit, or in what manner it was prepared, and for the further reason that it is hearsay and for the further reason that it doesn't prove or disprove any issues in this case, and for the further reason that it contains opinions and conclusions

of unknown parties. That is all. State objects to the introduction of Exhibit D, Defendant's Exhibit D, for the same reason.

THE COURT: All right, the objection will be sustained.

MR. HENNELLY: Very well, Your Honor.

MR. RILEY: In order that the record will be complete on behalf of the State, I offer Exhibits 14 and 15.

THE COURT: They are already in evidence, as far as the transcript of the record is concerned, and need not be recopied. They are not before the Jury. And so they will be available for the Court upon appeal if the matter is appealed, to look at and determine. You can exclude them from the transcript Mr. Ehlers, since they are already a part of the record, and photostatic copies can be supplied.

MR. RILEY: I expect you are making the same ruling on my offer as you made on his?

THE COURT: I am not going to receive them. Well, maybe I ought to let you make an objection, if you want to make one.

[588] MR. HENNELLY: Excuse me, I am put in a ridiculous position.

THE COURT: Let me say this, with the evidence, without an objection, the record may show that the Court will not permit Exhibits 14 and 15 to be read to the Jury, but they are in the record as far as the transcript is concerned, so they may be considered in connection with all of these questions in passing upon its admissibility into evidence by the Court on Appeal.

THE COURT: Gentlemen of the Jury, as I mentioned to you, I don't know if it was this morning or yesterday evening, in a trial of this type, there are various matters that have to be considered by the Court out of the hearing and in the presence of the Jury, relative to

admissibility or inadmissibility of evidence and testimony in the case. You have to be very patient and have had to be on two occasions today at least when matters had to be taken up, and first you were excluded from the Jury Room, and then just this evening when we had some matters to take up which we could take up here outside of your hearing, without having to send you out of the Court Room. I have also during this little lull in the proceedings, as far as the Jury is concerned, but we were passing upon a legal matter here, and I have inquired of counsel as to the further witnesses that will be used, and the possibility of using further witnesses and I have determined from what information that has been [589] given me, that it would be impossible for us to complete all of the testimony in this case tonight. And in other words, to go to the final conclusion of the case. You see after all the testimony has been received, you still have to have the instructions of the Court and the argument of counsel, and so it would be impossible and it would be wrong from a physical standpoint for everybody concerned, to try to continue on with this case this evening. So we are going to recess again for the evening, and I feel confident that this case will probably be concluded sometime tomorrow morning or shortly afternoon tomorrow. During the recess again tonight, you are instructed not to become separated from each other or permit anybody to talk to you about it, or discuss it with you. You will be in the custody of the Sheriff for the evening, and arrangements have been continued for your rooms down at the hotel, and any needs that you have, you can contact the Sheriff relative to those and he will see if they can be met for you. So with that, the Court will be in recess until tomorrow morning at nine o'clock, and all witnesses that are here are ordered back at that time.

And thereafter, to-wit: On the same day, the following order was entered of record:

[590] Circuit Court Record, Butler County, Missouri (Book 62, page 428) Tuesday, July 19th, 1955, Regular July 1955 Term

Now at this time, trial in this cause is recessed for the Evening Recess and the Jury is placed, by the Court, in the custody of the Sheriff of Butler County, Missouri, and it is ordered by the Court that this cause be laid over to July 20th, 1955.

And thereafter, to-wit: On the 20th day of July, 1955, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 429) Wednesday, July 20th, 1955, Regular July 1955 Term

Now on this day, again comes the parties herein, the Prosecuting Attorney of Cole County for the State, and the defendant herein, in person and by counsel, Mark Murray Hennelly, and also comes again the jury herein impaneled and sworn to try this cause. Whereupon, the trial is resumed in this cause, after night recess, and progresses in the hearing of the evidence to the conclusion thereof.

JAMES WILLIAM STIDHAM,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Hennelley

Q. What is your name, please? [591] A. James William Stidham.

Q. Mr. Stidham, when were you born? A. February 2nd, 1926.

Q. Have you got a birth certificate with you? A. Yes, I do have.

Q. Mark this Defendant's Exhibit H.

Reporter marked Exhibit H, birth certificate of James William Stidham.

Q. We offer this in evidence, if Your Honor please.

THE COURT: All right, there being no objection, it may be received in evidence.

Exhibit H, having been received in evidence, reads in words and figures as follows:

JEFFERSON COUNTY BOARD OF HEALTH
BUREAU OF RECORDS AND VITAL STATISTICS
Birmingham, Alabama

CERTIFIED COPY OF BIRTH RECORD

Full name of Child—James William Stidham—File No. 879 Bm

Color or Race—White Sex—Male Date of Birth—Feb. 2, 1926

Place of Birth—8509 Walker Ave., Birmingham, Alabama.

Usual Residence of Mother—Same

Father of Child—William Sylvester Stidham

Birthplace—Texas

Mother of Child—Opal Hughes Birthplace—Mississippi
Physician or Midwife in Attendance—J. C. Smith, M. D.
[592]Date Certificate Filed—February 1926

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

I hereby certify that the above is a true and correct abstract of information contained in the original birth certificate as filed and permanently recorded in the Bureau of Vital Statistics, Jefferson County Board of Health, Birmingham, Alabama, and is issued under the provisions

of Section 42, Title 22, State Code of Alabama, 1940, as amended.

/s/ Geo. A. Denison, M. D.
Health Officer.
By: /s/ Geo. V. Fruss,
(Seal) Registrar of Vital Statistics.

Date of Issue—January 18, 1955.

Exhibit H
LWE
7/20/55

Q. So that Mr. Stidham, how old were you then on the night of September 22nd, 1954? A. I was twenty-eight years old.

Q. Twenty-eight? A. Yes, sir.

Q. Now then, I am going to ask you, refer you, if you will, to State's Exhibit 1, which is the plat to your rear, and indicate to the Court and Jury where you were celling at that time? [593] A. At that time, I was in the cell next door to the shower.

Q. What was the number of your cell? A. I don't know the number of the cell.

Q. I see. You were next to the shower though? A. Yes.

Q. Which direction were you from Creighton? A. I was west from there.

Q. Now, can you indicate where Creighton was? A. I was never at his cell. I only know he was in an eastward direction from me.

Q. Now, point which way you mean, eastward? A. That direction.

Q. Down at that end? A. Yes, sir.

Q. Now then, I am going to ask you, did you at anytime—strike that. On the night of September 22nd, 1954,

did anything, did you hear any unusual noises or hear anything unusual? A. Yes, sir, I did.

Q. Approximately what time did that begin? A. I would say around six-thirty.

Q. Now, I am going to ask you Mr. Stidham, at any time after six-thirty, did you tell Mr. Donnell that if you got out, you were going to kill him? A. No, sir, I did not.

[594] Q. Did Mr. Donnell say anything, did you hear him say anything after six-thirty on that night? A. Yes, sir, I did.

Q. What did he say? A. He was talking up and down the walk saying that he was afraid of some guys in St. Louis who were intending to kill him.

MR. RILEY: Ask that that be stricken out, purely hearsay, what Donnell said.

THE COURT: This is the Defendant and Donnell is the party alleged to be deceased, the objection will be overruled.

Q. Now then, I will ask you, did you tell Mr. Creighton that you were going to kill him that night? A. No, sir, I didn't.

Q. Did you at anytime while you were in Death Row, tell Creighton you were going to kill him? A. No, sir, I didn't.

Q. Did Mr. Creighton, can you tell His Honor and this jury what Mr. Creighton said, anything he said to you during those times? A. Yes, sir, on numerous occasions.

Q. What did he do? A. He threatened to kill me and threatened to kill practically everybody in Death Row at different times.

MR. RILEY: Now, if the Court please, we object to what he [595] said to everybody else. I don't mind what he said to this man.

THE COURT: The way in which that answer came, and the scope of it, I think the last part of the answer may be stricken at this time. Now the witness may testify what Creighton told him, because Creighton has testified.

Q. Well, did you hear Mr. Creighton say anything in such a tone of voice that you could hear him from the time you were in Death Row up to the night of September 22nd? A. Yes, sir, I did, several times he said that he would kill two others—two other guys while he was in the Penitentiary and he intended to kill me at the same time.

MR. RILEY: This is not what he said to this Defendant Your Honor.

A. Yes, sir, he said that to me.

THE COURT: No he testified that is what he heard Creighton say at this time, 6:30. Go ahead

Q. All right, I am going to ask you on the night in question, which is September 22nd, 1954, at the time that you heard these unusual noises, did anybody by the name of DeLapp holler back to you, and holler, "Slick, we are coming in to get you out"? A. There was so much noise throughout the prison that I cannot say, because I don't know his voice, in fact I only knew him on sight.

[596] Q. Let me ask you this, did you have any conversation, you directly, from your cell, to anybody who was up in front knocking on any of those doors? A. No, sir, it was impossible on account of the noise.

Q. Now then, I am going to ask you sir, did you get out of your cell that night? A. Yes, sir, I did.

Q. Tell us what time approximately you got out of your cell? A. I would say around eight o'clock.

Q. And do you know who let you out of your cell? A. I don't know, but some colored fellow, I think his name was Ford.

Q. And what did you do when you got out of your cell? A. I went upstairs.

Q. Who did you go upstairs with? A. Don Lyons and Bill Crabtree.

Q. Now, when you say you went upstairs, did you leave this section in B basement? A. Yes, sir, I went directly upstairs from here, which would be B Hall.

Q. All right. And did you, were you joined by anybody else at anytime? A. Yes, sir.

Q. And by whom were you joined? [597] A. Red.

Q. And what is his name, what is his name, if you know? A. I don't know his first name.

Q. And where did you spend the rest of that night? A. It was in a cell that belonged to Don Lyons and Crabtree.

Q. And what were you doing in there? A. Listening to the radio and drinking coffee.

Q. I am going to ask you Mr. Stidham, did you make any, did you go into Mr. Donnell's cell on the night in question? A. No, sir, I did not.

Q. Did you kill Mr. Donnell, or did you slash him or cut him with a knife or anything on the night in question? A. No, sir, I am a thief, but I am not a murderer.

Q. Now then, let me ask you this, were you questioned by the police after that time? A. Yes, sir, I was.

Q. How many times after that were you questioned? A. The first time was shortly after midnight on September 24th.

Q. Who questioned you then? A. Members of the State Highway Patrol.

Q. Where? A. At the classification room at the Penitentiary.

Q. I am going to show you what has been accepted by His Honor, as evidence in this Court, as State's Ex-

hibit 11, and [598] ask you if that is the classification room? A. That appears to be.

Q. Is that where you were questioned? A. Yes, sir.

Q. Now, did this questioning, did they question you concerning the death of Walter Lee Donnell? A. Yes, sir.

Q. What did you tell them at that time? A. They asked me if I knew Donnell and that is the Trooper asked me that, and I told them that only on sight, and they asked me if I knew who killed him, and I told them no, and they asked if I participated in it, and I told them no. They made several threats to me trying to make me say that I did know who killed him, and I didn't know, and I couldn't say, and they also questioned me about different parts of the riot, which I didn't know anything about and couldn't have known anything about.

Q. Now then, how long did you stay in the classification room on that occasion? A. Probably an hour and a half.

Q. Now, when they got through questioning you in the classification room at this time, where did they take you? A. Near the end of that interrogation, I offered to take a lie detector test, and truth serum and show them that I was completely innocent of this crime, and that ended the [599] interrogation, and I was taken to my regular cell.

Q. You went back to your regular cell? A. Yes.

Q. Nobody struck you or did anything to you at that time? A. No, sir.

Q. So you were taken back to your regular cell? A. Yes, sir.

Q. Now, were you questioned at anytime after that Mr. Stidham? A. Yes, sir, I was.

Q. How many times after that were you questioned? A. The next time I was taken out of my cell, I believe it was on the 26th.

Q. And where were you questioned then? A. In the same room.

Q. Who questioned you there? A. Members of the Patrol.

Q. And for how long were you questioned? A. It was around an hour.

Q. And you continued to deny that you had anything to do with the murder? A. Yes, sir, I did.

Q. Now then, I will ask you, were you questioned at any other time Mr. Stidham? A. Yes, sir, I was.

[600] Q. Tell His Honor how many other times you were questioned by either the State Highway Patrol or by members of the St. Louis Police Department? A. They used to stop in front of my cell during the rounds and ask questions concerning the murder of Donnell, and each time I would deny it.

MR. RILEY: I wish that the witness would speak up.

A. Each time I advised them that I didn't know anything about the crime.

Q. Now then, were you on September 27th, were you questioned? A. Yes, sir, I was.

Q. And I will ask you Mr. Stidham, where did you, where were you celling on September 27th? A. I was in Death Row.

Q. Still in your same old cell? A. Still in the same cell.

Q. And I am going to ask you sir, who came and got you? A. There was a State Trooper and a St. Louis Policeman.

Q. Now, what happened when they came to your cell for you? A. They came to my cell around ten o'clock in the morning and said let's go, and I stepped to the door,

and one of the Policemen told me to pull off the watch, or they probably would break it, or mess it up some way, so I taken my watch off and gave it to the trusty. Then my hands were cuffed behind me and I was taken in front of B and C Hall, and placed [601] in a Patrol car and driven down to what is known as the athletic shed, or field house.

Q. Now then, were you questioned in the athletic shack sir? A. Yes, sir, I was.

Q. Tell us what happened as soon as you got in there. A. As soon as I went in there, there was a stool chair sitting on the floor, and I was placed in this chair and as soon as I was placed in there, some officer got in front of me and put handcuffs on my ankles and put a belt around my ankles, and something that locked, like a GI Belt, and at the same time they were taking the cuffs off of my hands and putting a heavy coat on me, and then cuffed them, handcuffed them, and a belt on my arms behind me.

Q. Did they rehandcuff your arms behind you? A. Yes, sir.

Q. Now, what happened then, sir? A. Lieutenant Eitzman, I didn't know his name at that time, but I learned his name, he asked me to tell everything that I knew about the riot and what happened on Death Row the night of the riot. I told him that I didn't participate in the riot and I didn't know what happened on Death Row the night of the riot.

Q. Did he ask you if you had anything to do with the death of Walter Lee Donnell? [602] A. Yes, sir, he did.

Q. What did you tell him? A. I told him I absolutely didn't.

Q. All right. And for how long did you continue to deny it sir? A. Well, I told the officers that I had been interrogated several times prior to that time, and that each time I had told them I didn't know anything about the murder or about the riot, and I told Lieutenant Eitzman

I was willing to take a lie detector test and truth serum test to show that I was completely innocent of the crime that he was asking me about, and at that time, Lieutenant Eitzman said, give him the lie detector test, and they had a rope on my handcuffs and they elevated me off of the floor and suspended me in the air.

Q. Now, at that time, approximately how many inches off of the ground were your feet? A. I would say between six inches and a foot.

Q. All right. Now, how long did you remain in that position? A. Around fifteen minutes the first time.

Q. Did they continue to question you while you were in that position? A. Yes, sir, they did. They didn't question me, they accused me.

[603] Q. All right. Did you at that time tell them that you had anything to do with the death of Walter Lee Donnell? A. I told them I was completely innocent of it, and didn't know anything about the riot.

Q. Did they cut you down? A. Yes, sir, after about fifteen minutes.

Q. Then what happened? A. I was taken over to a table and they talked to me and asked me to write a statement that they would dictate concerning the murder.

Q. How many times were you hanging there sir, did they put you back up again the second time? A. Yes, when I refused to sign the statement.

Q. Then how long did you hang there on the second occasion? A. It was quite sometime. I lost consciousness twice while I was hanging there on the second occasion, and near the end though, I heard one of the officers say that I had been up there thirty-five minutes, and during this time I knew that my hand and left arm had become paralyzed and numb.

Q. Now, did they do anything else to you besides that sir? A. Yes, sir, they did while I was hanging there, they took something like a stick, a ballbat, and I was beaten in front and beat on the body with that.

[604] Q. Now, after you had been up there thirty-five minutes sir, did you, were you taken down the second time? A. Yes, I was.

Q. What happened then? A. I was in real great pain, and I could no longer resist the torture.

Q. So what happened? A. And I agreed to write whatever they would dictate.

Q. All right. Now, I am going to show you what has been introduced into evidence as State's Exhibits 16 and 16-1, and ask you if that is the statement that you wrote? A. It appears to be, yes, sir.

Q. And this is your signature on it, isn't it? A. Yes, sir, it is.

Q. All right. Now then, this statement starts out, My name is James William Stidham, and I am twenty-five years of age. Now, as a matter of fact, how old were you that night sir? A. I was twenty-eight years old.

Q. Now, who told you to put down twenty-five years of age? A. The policemen.

Q. And do you know which one of the officers was dictating to you? A. Sergeant Little of the Highway Patrol.

Q. All right. Now, with respect to this section of the [605] statement that Paul Kenton, Laster, Thompson, Linder were also in the cell, now did you see any of those men around there sir? A. I wasn't around the cell myself, so I couldn't have seen any of them.

Q. What about, did you, did somebody tell you to write down two guys referring to each other as Thompson and Linder? A. Yes, sir, the St. Louis Policemen said write those guys down, because they knew they was im-

plicated in the crime, and those guys, Donnell testified against both guys.

Q. You know which St. Louis Police Officer told you that? A. No, sir, I don't, because I do not know who they were, but I do know that it was a St. Louis Police Officer. I believe it was Overbeck.

Q. I see. Now then, I am going to ask you Mr. Stidham, after you got finished signing that statement, I am going to ask you if you told any of those Police Officers there that the reason you killed Donnell, was because he had snitched on some friends of yours? A. No, sir.

Q. Well, had he snitched on any friends of yours? A. Not that I know of. I didn't know the guy except when I seen him in Death Row.

Q. All right. And did you tell him that you wanted to kill Creighton and that you would kill Creighton again? [606] A. No, sir, I didn't.

Q. All right. A. I told them that Creighton was always acting like a raving maniac on Death Row, and would sometimes go berserk and out of his head and rage for hours at a time, threatening to kill me and other guys around there, and that he had been in an argument and he said he had killed two other guys and I will kill you too.

Q. Now then, when you got finished signing this statement, what did they do with you? A. Well, they instructed me that under no circumstances was I to ever reveal the torture and the hanging that I went through in the field house, because it would cause an F.B.I. investigation, and might cause them some trouble if I did, and that they would have a chance to get me later, or get to me later or something, and they said, made some kind of a comment about showing us hoosiers something, a policeman made a comment.

Q. I will ask you this sir, were you taken back to your cell on this occasion? A. No, sir, I wasn't.

Q. Where did they take you to this time? A. What is known as O Hall.

Q. And what was the, can you give us some description of that cell sir? A. Yes, it was just a bare floor, a small cell with nothing [607] in it.

Q. And how long did you remain in that cell? A. I went in that cell on Monday and was taken out Wednesday morning I believe.

Q. Did anybody visit you? A. No, sir. Somebody attempted to visit me.

Q. Who attempted to visit you? A. The Priest at the prison.

Q. The Chaplain up at the Prison? A. Yes, sir.

Q. Did they permit him to visit you? A. No, sir.

MR. RILEY: Just a minute, wait until I object. I object to this unless this witness knows of his own knowledge or saw that they did not permit him to visit him.

THE COURT: Yes, that can be answered, you can answer that if you saw or actually know.

A. I know of my own knowledge.

MR. RILEY: You mean you know from an opinion that you have?

A. No, sir, I know of it of my own knowledge.

THE COURT: He may testify what he knows of his own knowledge.

Q. Tell us the circumstances under which you know that of your own knowledge, that the Chaplain tried to visit you. A. The Chaplain came to the door and shook the door and said [608] he wanted in, and there was several officers outside of the cell in the hallway, and they got in a huddle near my door, and said that is the Priest and these guys are beaten up too bad to let the Priest in to see them, and they refused to let him in.

Q. Now then, let me ask you this sir, did you leave the Penitentiary at anytime after that? A. Yes, I did. I left on September 29th, Wednesday morning.

Q. Where did you go? A. I went to the Cole County Court House.

Q. Let me ask you this, did you, were you taken at any time to a hospital? A. Yes, sir, I was taken to the U. S. Medical Center at Springfield, Missouri.

Q. And did you talk to some doctors down there? A. Yes, sir, I talked to at least two of them.

Q. Did you tell them what had happened to you? A. Yes, sir, I told the doctors that I had been hanging up by my arms and at that time my left hand and arm was stiff, paralyzed, and my fingers drawn up in that shape where I couldn't straighten them out, and I didn't have any strength in my left hand, and I told the doctors that.

Q. No further questions.

Cross-Examination by Mr. Riley

Q. Stidham, you say that you were twenty-eight years old in [609] September of 1954? A. Yes, sir.

Q. I will ask you if on September 29th or September 30th, 1954, if you didn't tell the authorities at the Springfield Federal Penitentiary that you were thirty-four years old? A. No, sir, I didn't. I said my age wasn't asked at Springfield.

Q. If their records say that you were thirty-four years of age on that date, are they wrong?

MR. HENNELLY: Object to that, that is argumentative.

A. They didn't ask my age.

THE COURT: Sustained.

Q. How long were you in O Hall? A. From Monday until Wednesday.

Q. I will ask you if you didn't testify—what time Monday? A. Around noon.

Q. Until what time Wednesday? A. In the morning.

Q. What time in the morning? A. About eight or eight-thirty.

Q. I will ask you if yesterday, on preliminary hearing on this matter, if you didn't testify that you were put in O Hall for three days? A. I said it covered a period of three days, that is Monday, Tuesday and Wednesday.

[610] Q. Well, actually you were there six hours less than two days, weren't you? A. Well, if you count it up, yes, I probably was.

Q. Now, when you were questioned in the classification room, how many officers, the first time, how many officers were there? A. I didn't count them, but I would say there was around fifteen.

Q. Now, who were they? A. Well, some of them I still don't know their names. Some of them I do know their names now.

Q. Who do you recall? A. Lieutenant Barton, State Highway Patrolman, Sergeant Olin Curtis.

Q. Who is Sergeant Olin Curtis? A. Of the Highway Patrol.

Q. Where is he from? A. Kansas City.

Q. He is from Kansas City? A. Yes.

Q. Do you know him? A. Upon sight, yes.

Q. Do you know Sergeant Olin Curtis? A. Yes, sir, I do.

Q. And you are sure that Olin Curtis was there in the classification room on September 24th? [611] A. Yes, I am because he told those State Highway Patrolmen there at that time that he didn't think it would do any good to—

Q. I can't hear you. A. He told those State Highway Patrolmen there at that time that he had arrested me in Kansas City before and interrogated me there.

Q. You are sure that it was Sergeant Olin Curtis from Kansas City, and you know him personally? A. I know him upon sight.

Q. Well, I say, I want you to be sure. What time was that? A. That was about three A.M. in the morning.

Q. Three A.M. in the morning of what day? A. September 24th.

Q. Well, didn't you just testify just now that it was after midnight on the 24th? A. Three A.M., I think that is after midnight.

Q. No, that would be after midnight on the 23rd. A. Well, it was after the 23rd, then.

Q. When you said the 24th, it actually wasn't the 24th, it was the 23rd, wasn't it? A. It was after midnight on the 23rd, yes.

Q. All right. Now, who did the questioning? A. Lieutenant Barton. He did the majority of it.

Q. Now, I will ask you if yesterday here, you didn't say that [612] Olin Curtis did most of it?

MR. HENNELLY: Excuse me, I am going to object, if Your Honor please, to the use of any of the material that was put before the Court in the motion to exclude certain elements, for the reason that by the very nature of that testimony, that was testimony for the Court only, for the purposes of the Court determining whether or not the statement was voluntary, and that it may not subsequently be used for the purposes of impeachment.

MR. RILEY: It is prior inconsistent statements Your Honor.

THE COURT: I think any prior inconsistent statement upon oath is admissible for the purpose of impeachment. I wouldn't permit the State to merely refer to it for the purposes of bringing out some things that may not be pertinent before this Jury, but certainly if there is, or should appear to be any inconsistency between the statement pre-

viously made under oath, whether in the presence of this Jury or not, I think they would be admissible for the purpose of impeachment.

MR. HENNELLY: Very well.

THE COURT: The objection will be overruled.

MR. RILEY: I will repeat my question. I will ask you if yesterday, the testimony here before the Court, if you didn't say that Olin Curtis did most of the questioning?

A. I believe I said Mr. Riley that he participated in it.

[613] Q. Didn't you use the words, most of it? A. He did participate in that, in that interrogation.

Q. Now, who else was there? A. Lieutenant Barton of the State Highway Patrol, Sergeant Nash, Sergeant Little of the Highway Patrol, and Trooper Caldwell and Inman and Barkley.

Q. Who else? A. Some of them I learned the names later.

Q. Who were they? A. Lieutenant Barton, Nash, and Inman, Barkley, Caldwell, and Little, and Curtis and there were several others there.

Q. That is seven, you say there were fifteen? A. Yes, sir.

Q. Now, you say you learned the— A. Yesterday I believe I said I learned eight of them.

Q. Who were the, name the eight that you learned their names later on. A. Barkley, Nash, Inman.

Q. No, I mean of the eight that you haven't mentioned? A. Well, there is one more that I don't recall right at the moment.

Q. What is that? A. There is one more that I named yesterday.

Q. Who is that one more? A. I don't know that now.

[614] Q. You don't know any of these other eight? A. Well, I believe that I named eight of them yesterday.

Q. Barton, Caldwell, Barkley, Inman, Nash, Little and Curtis, seven as I count them. A. Yes, sir.

Q. How big is this classification room? A. I couldn't estimate it.

Q. Well, could you show the jury what space in this room would equal the area of that classification room? A. I would say that it is as large as the Jury box.

Q. About the size of the Jury box? A. Yes, sir.

Q. And was there a table in there? A. There was, but it wasn't in the position at this time.

Q. Where was it? A. It was more or less in the center of the floor.

Q. Well, how many chairs were in there? A. I don't know, some of the officers were sitting and some standing.

Q. How many were sitting and how many were standing? A. I don't know.

Q. Now, you say that this room is about the size of this Jury box? A. I never did have any reason to look it over real good Mr. Riley, but I would say at this time that it is about that [615] size.

Q. You have been in that room a number of times, haven't you? A. Yes, sir.

Q. I mean you have been in there times other than when the Patrol took you there, haven't you? A. I have.

Q. And you tell this Jury that there were fifteen officers in there, as well as this table? A. Yes, sir. In fact I seen eighteen ball players in that room.

Q. That would be sixteen, and that room is about as big as this Jury box? A. I would say it is about that size.

Q. Now, with twleve men sitting in that Jury box, could you find room to put that table?

MR. HENNELLY: Certainly object to that, that would be argumentative.

Q. Stidham, you have been convicted of a crime? A. Yes, sir, I have.

Q. Tell this Jury when and where? A. I was convicted April 2nd, 1943, at Memphis, Tennessee.

Q. On April 2nd, 1943, at Memphis, Tennessee, for stealing an automobile, and where else? First, what sentence did you receive? [616] A. I received three years in the Reformatory.

Q. Where else, and what other crimes have you been convicted of? What Court was that Stidham? A. In Federal Court.

Q. All right. Then convicted of any other crimes? A. I don't have any other convictions against me other than this present one, and the one I just mentioned.

Q. What crime are you convicted of, serving now? A. Robbery.

Q. What sentence do you have? A. Twenty-five years.

Q. What County was that from? A. Jasper County.

Q. When was that? A. I received the sentence on May 28, 1952.

Q. Was that robbery in the first degree with a dangerous and deadly weapon? A. It was robbery, yes, sir.

Q. Now, how many times were you questioned in your cell? A. The State Troopers and the St. Louis Police, they were patroling in front of the cell maybe every hour or every two hours, and on several occasions they would stop in front of my cell.

Q. Now, who were those troopers? A. They was just members of the State Highway Patrol and [617] St. Louis Police.

Q. How many times were you questioned? A. I would say four or five days time, a day probably, total number up to twenty-five times in five to eight days.

Q. Now, how long did they question you? A. They would stop and ask me questions about the crime, and I would tell them I didn't know anything about it, and I certainly knew I wasn't involved in it.

Q. There were other inmates present at the time weren't there? A. No, sir, there wasn't.

Q. You mean you were in Death Row all by yourself? A. There was one inmate two cells from me.

Q. Who was that? A. That was Rollie Laster.

Q. Where was Ford? A. Ford, he was a few cells up the line toward the west.

Q. And where was Coffman? A. He was in the same direction up that way.

Q. And where was Booker? A. He was up near the west end.

Q. And where was Heaton? A. He was next door to me.

Q. And where was Reece? [618] A. He was up on the far west end.

Q. Now, you were next to the shower, weren't you, just west of the shower? A. Yes, sir, I was.

Q. Now, if the testimony has been that No. 22 is the shower, you would have been in 23, is that right? A. If 22 was the shower, I was in 23, yes.

Q. Now, where was Laster? A. He was one cell east of the shower.

Q. Then he would have been in 21? A. Yes, he would have.

Q. And who was in 24? A. 24, that would be the cell next door to me, would be Heaton.

Q. And anybody in 25? A. I believe Hoffman was in that cell.

Q. Hoffman? A. Yes, sir.

Q. And 26? A. Ford.

Q. And 27? A. I don't recall anybody being in that cell.

Q. All right, twenty-eight? A. I don't recall anybody being in that cell.

Q. And 29? A. I don't believe anybody was in that one either.

[619] Q. 30? A. Booker, I think Booker was in 30 or 31.

Q. And 32? A. That was Reece.

Q. Then when these Patrolmen questioned you there in your cell, there were other inmates all around there, weren't there? Heaton was right next to you, just two feet from you? A. Heaton was next door, yes.

Q. And Rollie Laster was just one cell that separated you? A. That is correct.

Q. Now, could those two inmates have heard what the Patrolmen said to you?

MR. HENNELLY: Object to that, being a conclusion on the part of this witness.

Q. Did he question you in a loud voice?

THE COURT: Sustained.

A. No, sir, it wasn't Mr. Riley.

Q. Well, they weren't inside of the cage, they was in the aisle out here? A. Yes, but they was in a low voice, they wasn't what you would call a loud voice. I think more of a normal tone of conversation would cover it.

Q. Now, you say that, do you know DeLapp? A. Upon sight only.

Q. And you went up to B Hall, and who were you with? [620] A. Don Lyons and Bill Crabtree.

Q. And who else? A. Those were the only two that I went upstairs with. When I got up there, there was another guy named Reed, he was with us.

Q. And who else? A. Those were the only ones.

Q. All night long? A. Those are the only guys that I was with during the entire night, yes.

Q. All right. Now, I will ask you if you recall when the loud speaker was brought in that night? A. No, sir, I don't.

Q. You don't? A. No, sir.

Q. Did you hear a loud speaker? A. Well, I heard some noise, and there was so many different noises Mr. Riley. I can't say whether I heard a loud speaker or not. Several radios were going.

Q. I will ask you if you weren't with DeLapp, Hoover and Laster in B Hall when the loud speaker was brought in?

MR. HENNELLY: Object for the reason that the time is not sufficiently fixed, and the question is too vague, indefinite and uncertain, particularly since the witness has testified that he doesn't know about the loud speaker.

THE COURT: The witness testified of course who he was with, [621] and the Prosecuting Attorney would have a right to cross examine him upon that. The objection will be overruled.

Q. Were you or weren't you? A. I don't recall a loud speaker Mr. Riley.

Q. I am asking you, were you with DeLapp, Laster and Hoover? A. No, sir.

Q. At no time during that night up in B Hall were you with those three inmates? A. The only time I seen DeLapp that night, he was standing on the steps of B and C Hall.

Q. And when was that? A. That was when I first went upstairs.

Q. And what time was that? A. I don't know the exact time, I would say around eight o'clock.

Q. You stayed in the cell all the time? A. My cell?

Q. Whatever cell you went to? A. Part of the time, yes.

Q. What did you do the rest of the time? A. Well, about midnight, we stayed there and listened to the radio, and several news casts were coming over about the riot, and we drank some coffee.

Q. What else? A. And then—

[622] MR. HENNELLY: Speak loudly, the Reporter is having difficulty, and he has to write it.

A. Lyons and myself, we walked up and down the hall of B Hall.

Q. What hall? A. B Hall.

Q. How long did you walk? A. I don't know, not too long, probably an hour.

Q. What else did you do? A. And then we went back to the cell.

Q. What cell? A. I really don't have any way of knowing whose cell, who is up there Mr. Riley.

Q. Well, was it Lyons' cell? A. I don't know whether it was his cell or not. I can't say to my own knowledge.

Q. Did you stay in that cell the rest of the night? A. Yes, sir.

Q. Did you see Shaky Dietzel up there that night? A. No, sir, I didn't.

Q. Never saw Dietzel? A. No, sir, I didn't.

Q. I believe you testified that you were hung up by this rope down in the field house fifteen minutes? A. I certainly was, yes, sir.

Q. I will ask you if you can stand up here and show this Jury just how that was done? [623] A. Mr. Riley, I believe that we could show it better if you would bring a rope and handcuffs in here and I can demonstrate it.

THE COURT: Can you stand up and show how it was done, is the question, the position that you were in.

A. I don't believe I can stand up and show you how it was done.

Q. You don't believe you could do it? A. But I think I can explain the procedure to you from this chair.

Q. I was just wondering if you could show the Jury, but you don't think you can do it? A. I was brought in and I was told to sit in a chair, or seat.

Q. Now, that is, I asked you if you could stand out here and show this Jury just how you were hung up. A. My hands and cuffs and belt were behind me.

Q. They were cuffed? A. Yes, sir. And my ankles were cuffed and the belt and then I was lifted off of the floor.

Q. Which way? A. I was lifted off of the floor by a policeman, and after I was so many inches off the floor, the rope was tied, and what I believe is a web partition and the rope was tied in there, and I was dangling in mid-air.

[624] Q. What is a web partition? A. It is, I would call it a partition that separates the room which we were in, and another room, but it has those square holes in it, probably that big a square.

Q. The partition does? A. I believe it does, yes.

Q. Well, what was the rope tied to? A. Well, the end of the rope was tied into this partition.

Q. Tied into it? A. I believe it was, yes, sir.

Q. Where was the other end? A. The other end was on the ceiling.

Q. Now,— A. In some fashion.

Q. What fashion? A. When I was hanging up in that position, I didn't look to the ceiling and I don't believe I could have looked at the ceiling if I wanted to.

Q. Now, how long were you down there? A. How long was I down there?

Q. Altogether? A. Altogether?

Q. Yes. A. In that building?

Q. Yes. A. I don't know definitely, but I believe that I went down around ten A.M. in the morning and left somewhere around 12:30.

Q. And you just hung out in the middle of that room? [625] A. No, not in the middle of the room.

Q. Well, where was it? A. As you come in the door it was on the left hand side and near the center of the room. That is near the center going toward the end.

Q. These Policemen just held you up like that and tied you, is that right? A. The rope was already tied on the handcuffs before I was held up. The rope had already been attached to the handcuffs before they held me up, and after I was held up off of the floor, they released me. They released their hold from me, but I remember one of the officers said let him down real easy, because if you let him down, let him drop, he will break both arms, and so they eased me down gently.

Q. If you fell on the floor, if they let you down hard and you fell on the floor, it would have turned your arms loose, wouldn't it?

MR. HENNELLY: Object to that as argumentative.

A. At that time Mr. Riley—

THE COURT: Overruled.

A. At that time Mr. Riley—well not with the end of the rope attached to the web partition, no, sir, and also attached onto my arms.

Q. Well then, you were leaning against the partition, weren't [626] you? A. No, sir. However, I was close enough to the partition where that I could draw my legs up and touch the partition.

Q. Well, if this rope went through the partition, and the other end was on your arms, and they raised you up, wouldn't you be against the partition? A. No, sir, I wouldn't be Mr. Riley, because the way this rope was,

I would say that it was attached to the ceiling probably eighteen inches from this web partition.

Q. Oh, it was attached to the ceiling? A. Attached to the ceiling and then connected to the web partition.

Q. And was there more than one rope down there? A. Oh, I only seen the rope that I was hanging with.

Q. Well, they cut you down after the first fifteen minutes? A. Yes, they released me after fifteen minutes.

Q. What did they use for a rope the second time? A. The same rope.

Q. Well, they just cut it? A. I didn't say they cut it.

Q. Didn't you say they cut you down? A. I said they released me.

Q. I will ask you if on direct examination, you didn't say they cut you down after fifteen minutes? A. Well, they released me after fifteen minutes.

[627] Q. They released you, then they didn't cut you down? A. Well, I would express it even like that Mr. Riley.

Q. What? A. I would even express it that they did cut me down. That is saying that they released me.

Q. Now, which arm was paralyzed? A. My left one.

Q. Did it injure your right one at all? A. Yes, sir.

Q. What did it do? A. It, my handcuffs, they slipped down over this heavy coat sleeve, and it scarred it.

Q. Did it scar your right arm? A. Yes, sir.

Q. How big a scar? A. Well, I believe it circled my wrist.

Q. How long did that scar last? A. That was ten months ago, it wasn't a few days.

Q. Well, did you have that scar circling your wrist when you got to the Springfield Penitentiary? A. Yes, I did.

Q. Did you show it to them? A. Yes, sir, I did. But I was mainly concerned about my left hand, because it was paralyzed and numb. That is the one I talked to the doctor about mostly.

[628] Q. But did you show them that scar? A. As I said Mr. Riley, I was mainly concerned with my left hand, and arm, and my fingers were drawn up.

Q. I didn't ask you that, I asked you if you showed them that scar at Springfield, the one that circled your wrist? A. The one that circled my right wrist?

Q. Yes. A. I believe that I did Mr. Riley.

Q. Well, did you or didn't you? A. I would say that I did, yes.

Q. All right. What other scars or bruises did you have on you? A. I had scars and bruises on my legs.

Q. Now, which leg? A. On both of them, around my ankles.

Q. Now, where on your legs? A. On the shins and the ankles.

Q. Have any on your stomach? A. Yes, sir I had bruises on my stomach.

Q. And all these bruises lasted until you got to Springfield? A. Yes, sir, at least I recall soreness.

Q. Well— A. I know that when I would go to bed at night, I was awful sore all over.

Q. Now, were there any on the upper part of your legs? A. On the upper part of my legs?

Q. Yes. A. I don't recall at this time Mr. [629] Riley. I would say there were bruises, but I wouldn't say there were scars there.

Q. Bruises? A. Yes, sir. I know that, that I was beaten all up and down my legs.

Q. Were you beaten about your head and face? A. No, sir, I wasn't.

Q. Were you slapped or hit? A. No, sir, I wasn't, not with the open hand or the fist.

Q. Were you beaten about your chest or back? A. Yes, sir, about my chest and stomach.

Q. Did you have any bruises on your chest? A. I don't know Mr. Riley. The reason I can't answer that is because when I was hanging in that position, the torture that was so unbearable, and causing me so much trouble, that my shoulders and arms, and that made the other seem minor.

Q. Your Honor, that is not responsive to the question.

THE COURT: I don't know, the objection will be overruled, the witness may answer.

Q. All right. A. I said at that time when I was hanging in that position that the pain in my chest and in my shoulders and in my arms was so unbearable, that the licks that were put on me, that is with the sticks and clubs by the police officers, they really didn't hurt too bad Mr. Riley. I knew it was being done, but the greater [630] pain was up here from being hung up, and that kind of made the licks seem minor to me, and I just knew they were being inflicted upon me.

Q. Well, after that, did you have any bruises on your chest? A. Since I don't recall any, I would say no. There was some soreness in there though.

Q. Now, what was the condition of your left hand on the morning of September 29th? A. On the morning of September 29th, my fingers were drawn up in that fashion and I still have one scar here where the cuffs bit into my hand.

Q. How big was that scar? A. You can see it yourself. It covers about the size of a nickel I would say.

Q. What part of your arm was it on? A. Right here, right at the wrist.

Q. Well—

THE COURT: You pointed— A. Yes, it is right here, is where it is.

THE COURT: Below your wrist?

A. Yes, sir.

MR. RILEY: Could you hold your other fingers out? A. Yes, sir, I could.

Q. Mark this Exhibit 17.

[631] Reporter marked Exhibit 17, a photograph.

Q. Mr. Stidham, I will show you what has been marked State's Exhibit No. 17, and do you know what that is, can you tell what that is?

MR. HENNELLY: Excuse me, before they even do this, I think even for the purposes of identification, identifying this picture, I think that I will object to that, even having him identify it, for the reason it is highly prejudicial, and the picture itself is prejudicial, and is done to prejudice this Jury, and it doesn't tend to prove or disprove any issue in the case, and to even have him identify it, invites prejudice to this Jury, and against this Defendant.

THE COURT: Well, of course any exhibit can be identified. Your objection will be overruled.

MR. RILEY: (Out of the hearing of the Jury) If the Court please, if I can identify the whole picture, we will take a scissors and slice out him, I want to show, I want to show his left hand.

THE COURT: When was this taken?

MR. RILEY: September 29, Nine A.M., excuse me, about eleven A.M.

THE COURT: The objection will be overruled.

MR. HENNELLY: Very well.

MR. HENNELLY: This is for the purpose of identification now.

[632] Q. Stidham, do you know what that exhibit is? A. Yes, sir, it is a picture that was taken I believe in the Cole County Court House.

Q. That was taken on the morning of September 29th, just before you went to Springfield? A. I couldn't say whether it was on September 29th or not, Mr. Riley, because they had me in this Court Room on several occasions, and each time there was pictures snapped of us.

Q. You won't say that was September 29th? A. I can't say it for sure, no, sir.

Q. Then can you tell from this photograph whether or not it was after you were questioned in the recreation room and before you went to Springfield, when this photograph was taken? A. Could I tell whether it was?

Q. After— A. Before we appeared in Springfield?

Q. Before you went to Springfield, but after you were questioned in the athletic room? A. No, sir, I couldn't Mr. Riley, because I believe we appeared in that Court Room, and probably appeared in the same position here several times within a six day period.

Q. Will you take a look at the Judge on the bench? A. I believe we appeared before this Judge three times and probably four. There is another picture that was taken when [633] we got on the bus. I would recognize it.

THE COURT: Were you taken to the Cole County Court House prior to the time that you were questioned on September 27th, 1954, at the field house? A. No, sir, I wasn't.

Q. Were you taken there between the 27th, the time you were questioned, and before you went to Springfield? A. You mean after the questioning?

Q. Were you taken to the Court House after September 27th, after the questioning, and before you went to Springfield? A. Yes, sir, I was.

Q. How many times? A. One time.

THE COURT: All right, go ahead.

MR. RILEY: I will ask you Mr. Stidham, does your photograph appear on there?

A. Yes, sir, it does.

Q. And does that photograph include your left hand? A. Well, it includes the thumb and this finger here, yes.

Q. And you recognize this officer standing here, the officer standing to your left? A. I recognize him as the St. Louis Policeman, yes.

Q. And you saw him on the witness stand here yesterday, didn't you? A. Yes, sir, I did.

[634] Q. Officer Billings? A. That is right.

Q. All right, I think that is all. A. There was a picture taken Mr. Riley of us getting on the bus that shows a real fine picture of my left hand and in fact it shows the scars that I had on it.

Q. Who took the picture? A. Well, the photographer for the Jefferson City newspaper.

Q. Will you mark this Exhibit 18, and will you mark this Exhibit 19?

Reporter marked Exhibit 18, a letter addressed to Sam C. Blair from Mr. Stidham.

Reporter marked Exhibit 19, a letter to Mr. Bredeman from Mr. Stidham.

Q. Mr. Stidham, I show you what has been marked Exhibit No. 18, and will ask you if that exhibit is in your handwriting? A. Yes, sir, that is my handwriting.

Q. And Exhibit No. 19? A. Yes, sir, that is my handwriting also.

Q. And what day was Exhibit No. 18 written? A. On December 7th, 1954.

Q. And what day was Exhibit No. 19 written? A. February 23rd, 1955.

Q. Where were you when you wrote those? A. I was in Death Row in the Missouri State Penitentiary.

[635] Q. You were in your cell? A. I was in my cell, yes, sir.

Q. At this time we offer Exhibit 18 and Exhibit 19, for the purpose of comparison of handwriting, with Exhibit 16 and 16-1.

MR. HENNELLY: I am going to object to their introduction, and I am going to ask that counsel be reprimanded for attempting to introduce them, for the reason that there has been no question raised but what Exhibit 16 and 16-1 is in the Defendant's handwriting, and the Defendant has admitted and stipulated that it is in the handwriting, and the only purpose of submitting these exhibits before this Jury is for the purpose of getting foreign extraneous material before this Jury, which will bias and prejudice the rights of this Defendant, and deprive him of certain Constitutional Rights, totally irrelevant and immaterial to any point in issue in the case, and beyond the scope of examination in chief.

THE COURT: The question of his handwriting is not beyond the examination in chief. He has testified that he signed this and he has testified as to what happened to him prior to his signing it. Therefore, anything in connection with his handwriting and the legibility, etc., and his physical condition would be pertinent to the issues in the case, and within the scope of his direct examination. Now, I don't know what these letters contain.

[636] MR. RILEY: You can, if the Court wants to, he can cut the matter out of the letter and let them see the signature.

THE COURT: You can't cut the material out without cutting the letter out, the writing, and your purpose in your offer of this is merely for comparing the handwriting.

MR. RILEY: You can cut the Very Truly Yours off of that and have his signature.

MR. HENNELLY: Object to it because there has been no question raised, and since this was not written with the same hand, this man is right handed, and the injury was to the left hand, he makes no claim that there was any paralysis to the right hand, he makes no claim that it is not his signature.

THE COURT: No, but he has testified that he was hung up there about fifteen minutes and was taken down, and told to write Exhibit 16 and 16-1, and then they took him back and hung him up ag[illegible] for he didn't know how long, but he heard one of the officers say he had been up there at least thirty-five minutes, and that would be a total of fifty minutes within a space of from ten to twelve or twelve-thirty, which included some questions and answers and writing, and that this all took place and then he was brought down and told what to write and did write Exhibit 16 and 16-1. Now, I think it is within the scope of the examination of this case, that the handwriting would be pertinent to the issues, [637] and within the scope for comparison, and the Jury would be entitled to compare it and see. They have a right to pass upon the credibility of his testimony.

MR. HENNELLY: I certainly think that the whole body of those letters—

THE COURT: That is the only thing that has me confronted, that there may be things in the body of the letter which can't be eliminated.

MR. HENNELLY: If the Court lets them see the signature, that is one thing.

THE COURT: All right, I am ready to rule on this.

MR. RILEY: If the Court please, I have another one which—

THE COURT: I think that for the purposes which this is offered, and because of the fact that there may be

matters in the letters which are not pertinent to the issues in this case, and only for the purpose of comparison of handwriting, that the Court will permit Exhibit 19—let's go to Exhibit 18, that typewritten portion and the address to whom the letter is directed, which is Sam Blair, relationship—business, Cole County Court House, City of Jefferson City, December 7, 1954, Dear Judge Blair: Pursuant to your suggestion in open Court yesterday, I am mailing this letter to you—from there on down, it will be out until the paragraph, Trusting to hear from you in the near future, I remain,—and what is it, the salutation, Respectfully Yours, James W. [638] Stidham, 65993, B-B., will be allowed in evidence, the balance of the two paragraphs in between what I have just read will be cut out, and I think a piece of paper can be laid on there.

MR. RILEY: You mean cut this out?

THE COURT: It looks to me like a paper could be laid across there and just pasted on. Exhibit 19, the typewritten portion at the top and the name to whom addressed, and the reason for it, and then, Dear Mr. Bredeman:, and then at the bottom, Trusting to hear from you at an early date, I am, and Very Truly Yours, James W. Stidham, 65993, those parts may be in, and the two paragraphs after Mr. Bredeman, the name, and Trusting to hear from you at an early date, will not be in.

MR. HENNELLY: Let me renew this objection.

THE COURT: All right.

MR. HENNELLY: I am objecting to the use of both of these exhibits because they are hearsay, and even in the form which the Court presently suggests that it is going to permit the Jury to examine them, for the reason that is, these are questions which go to expert testimony. It is going to be a matter that is going to confuse the Jury. It is going to give them a roving commission on matters com-

pletely extraneous, immaterial to any point at issue in the case.

THE COURT: The objection is overruled.

Exhibit 18, having been received in evidence, that [639] portion which was received in evidence, reads in words and figures as follows:

Missouri State Penitentiary, Box 900, Jefferson City, Mo. Name—Honorable Sam C. Blair, Relationship—Business Street No. Cole County Court House, Jefferson City, Missouri

December 7, 1954

Dear Judge Blair:

Pursuant to your suggestion in open Court yesterday, I am mailing this letter to you.

Trusting to hear from you in the near future, I remain,

Respectfully Yours,

/s/ James W. Stidham
65993
B-B.

Exhibit 18
LWE
7/20/55

Exhibit 19, having been received in evidence, that portion which the Court permitted in evidence, reads in words and figures as follows:

Missouri State Penitentiary, Box 900, Jefferson City, Mo. Name—Mr. Louis E. Bredeman Relationship—Busi-

ness Street No.—Cole County Courthouse, Jefferson City, Missouri.

February 23 - 55

Dear Mr. Bredeman:

[640] Trusting to hear from you at an early date, I am,

Very Truly Yours,

/s/ James W. Stidham
65993

Exhibit 19
LWE
7/20/55

THE COURT: We will take a short recess. Now, will the people in the Court Room just remain seated where you are until the Jury passes back through the Court Room and goes back to the Library Room, because it is a lot cooler back there.

MR. RILEY: I am going to go back to State's Exhibit No. 18 Stidham, now that is your signature on that exhibit, isn't it?

A. Yes, sir, it is Mr. Riley.

Q. You put it on there? A. Yes, sir, I did.

Q. And the other writing that is shown on there is your writing too, isn't it? A. No, sir, not all of it.

THE COURT: There of course is the exhibit number and the notation there of the court file.

A. Other than those two.

THE COURT: Exclusive of this exhibit number and these words, [641] Court File, and the typewriting, is the balance of it in your handwriting?

A. Yes, sir, it is.

MR. RILEY: Now, Exhibit No. 19, exclusive of the exhibit marking there and the black ink showing Court

File, and the typewriting, is the rest of it in your handwriting?

A. Yes, sir, it is with exception of the date received.

THE COURT: Just circle the Exhibit number and the received number and the Court File, and do that on the other one too, and it will be all right. The Court File and the exhibit number.

MR. RILEY: If the Court please, I would like to pass these to the Jury along with Exhibits 16 and 16-1.

THE COURT: Is there any reason why you couldn't go ahead and complete your cross-examination before those are shown to the Jury? It is just a matter of time. I think we could probably save a little more time if we continued with your cross-examination.

MR. RILEY: Stidham, at the time you say you were hung up the first time, fifteen minutes?

A. About that time Mr. Riley.

Q. And the second time thirty-five minutes? A. Yes, sir, I make that estimate on what I heard one of the officers say.

Q. Now, as you were hanging there with your arms behind you, [642] and ropes tied through the handcuffs, did you balance, or did you tip? A. Well, I didn't balance, no, sir.

Q. Which end of you tipped, your head or your feet? A. This part of my body up, from my waist up.

Q. That tipped to the ground? A. Yes, sir.

Q. Well, did you fall, did you tip far enough to go to the ground? A. No, sir.

Q. Well, I will ask you if you could stand in front of the Jury and show the Jury what position you were in after you tipped or tilted?

MR. HENNELLY: Come down in front of the Jury box Mr. Stidham.

A. Well, gradually, as I was hanging with my arms increasingly raised, and my body was probably bent over in that fashion.

Q. That fashion? A. Something like it.

Q. And you didn't tip all the way over? A. No, sir, I didn't.

Q. And after your feet were off the ground, you say you didn't tilt or tip, or turn over? A. No, sir. I believe Mr. Riley, if we had a rope and handcuffs, I believe we could put it over there, over that door [643] and give a good demonstration of that.

MR. HENNELLY: It is agreeable to me.

Q. You can do it if you want to.

MR. HENNELLY: Get a rope and some handcuffs.

THE COURT: Let's not proceed further on that until we discuss it.

MR. HENNELLY: Very well Your Honor.

Q. I believe you testified yesterday that the bruises were all over your legs? A. Yes, sir, bruises were on my legs.

Q. Were they all over your legs? A. I know they were mainly on my shins Mr. Riley, and around my ankles.

Q. Up in O Hall, you and Lyons just walked around? A. You mean in B Hall?

Q. I mean B Hall, yes. A. Yes, sir.

Q. Where was Crabtree? A. Since he wasn't in my sight at that time, I can't say.

Q. Did you just testify that you were in the cell with Lyons and Crabtree? A. Yes, sir, I did.

Q. Where was Reed? A. He was there.

Q. How long did those boys stay with you? A. I would say until midnight.

[644] Q. You didn't see Dietzel up there at all? A. No, sir, I didn't. This was on the first floor of B Hall.

Q. Did you ever go back downstairs into B basement? A. No, sir, I didn't Mr. Riley.

Q. Never did? A. No, sir, I didn't.

Q. What time did you come out of B Hall? A. You mean after the riot was over you mean?

Q. Well, what time? A. You mean after the riot was over?

Q. Yes, whenever you came out? A. That is when the Troopers came in and taken us out.

Q. What time was that? A. It was around seven o'clock in the morning.

Q. Now, you say you think it was an inmate by the name of Ford that let you out? A. Yes, sir, I do.

Q. Well, now, you know Ford well, don't you? A No, sir, I don't know him well Mr. Riley.

Q. Well, how long had you been in Death Row before September 22nd, 1954? A. Not quite two months.

Q. Not quite two months? A. No, sir.

Q. Ford was there all the time, wasn't he? [645] A. I believe he was, but he wasn't in my sight.

Q. Well, how many times have you seen Ford since then?

MR. HENNELLY: Object if Your Honor please, that is beyond the scope of the examination in chief, and irrelevant and immaterial to any point at issue in the case.

THE COURT: The objection is overruled in view of the witness' statement previously to this Court. Overruled. Have you seen him since?

A. Possibly I have, but I frankly don't recall looking directly at him since then.

MR. RILEY: He celled in Death Row up to a short time ago, didn't he? A. Yes, sir, he did.

Q. And you are celling in Death Row, and have been since November of 54? A. You never get a chance to see those other prisoners down there Mr. Riley.

MR. HENNELLY: Speak up there, this man has to write everything down.

Q. You— A. You seldom ever get a chance to see other prisoners down there, unless you stand at your door all the time and see one come by. When I said I thought Mr. Ford opened, Charley Ford opened my door, my door was opened there and there was a lot of excitement down there, many many men running [646] backward and forward, and all the lights had been knocked out, and windows had been knocked out, and I didn't pay too much attention to who did open my door, but I do believe Ford did. I know there was a colored guy opened my door.

Q. Now, who did you give your watch to? A. Leon Wade.

Q. Who? A. Leon Wade.

Q. Does he go by the name of Blue? A. Yes, he does.

Q. Now, did this hanging up, did that hurt your right arm or your right hand any other way than to scar it, as you mentioned? A. It made a bruise on there Mr. Riley.

Q. A bruise that went around your wrist? A. Yes, it went around my wrist. I wouldn't say that it circled my entire wrist, but it was around my wrist.

Q. How wide was it? A. I don't think I could estimate it accurately, but I would say that it was probably half an inch or maybe a quarter.

Q. How wide are the handcuffs? A. Well, I can't say.

Q. But you were able to write with your right hand after you were hung up? A. Yes, sir, I was able to write. However, I think I had a [647] lot of dead weight on the pen when I was writing.

Q. Well, how soon after you were let down after the second hanging, which was about thirty-five minutes, did you start to write? A. It must have been probably five minutes or so, because when I was let down the second

time, these two fingers here seemed to be in a spasm, like a spasm, and kind of a nervous spasm, and jumping and there was some handballs in the shack, in the field house, and one of the officers gave me one of those handballs to squeeze in my hand.

Q. Now, you have, don't you, a large scar on your left hand? A. I wouldn't call it a large scar, it is the place where I had a wart removed.

Q. You mean on the inside? A. On the inside. I used to catch ball and that is where I had a callous on there from catching baseball.

Q. Isn't that a large scar there? A. That is what was a callous, and in fact I always did refer to it as a callous, and never was cut there or anything.

Q. What is that? A. That right there, that is something I got while I was up in jail.

Q. How long have you had that injury or scar or whatever you [648] want to call it, to your left hand? A. Are you talking about where I had the wart removed?

Q. What? A. Where I had the wart removed?

Q. No, up in the palm of your hand there over your two little small fingers? A. I never did consider it no injury Mr. Riley, because the only reason that that got there, was because I used to catch hard ball, and that made a callous there.

Q. How long have you had that? A. Probably ten years.

Q. Did you ever hurt your fingers when you were catching hard ball? A. No, sir.

Q. Never did? A. Well, when I say that I never did hurt them, I mean where the injury lasted any length of time.

Q. A ball never did hit your fingers at all? A. Certainly it hit my fingers.

MR. HENNELLY: Object to that, I think that this is
yond the scope of the examination in chief.
bey THE COURT: Well, sustained. I think, I don't think
i need to go any further in that.
you Q. I believe that is all.
[649] *Redirect Examination by Mr. Hennelly*
Q. Mr. Stidham, was there anything the matter with
muscles of your left hand prior to the time that you
the nt into that shack? A. No, sir, my hand and arm was
wer very good shape at the time I went into that shack.
in Q. You had no paralysis or anything like that to the
hand, is that right? A. Certainly not.
left Q. No further questions.
MR. RILEY: That is all.
MR. HENNELLY: Step down.
MR. RILEY: May I pass these at this time?
THE COURT: Yes, you may. (Out of the hearing of
Jury) I wonder Mr. Riley, if for the purposes of these
the ibits, the Court might mention that the reason they
exh being passed to the Jury is for the handwriting? I no-
are one Juror beginning to read both exhibits. It has
tice eady been around. I don't know if it would be guilty of
alre mmenting on the evidence or not. I might just caution
con Jury to read the front of the pages, and just for the
the pose of comparing the handwriting.
pur MR. HENNELLY: I think that under these circum-
nces, with 16 and 16-1 going before the Jury, that under
star se circumstances, that it amounts to undue emphasis on
the section of [650] the testimony, and that is the ex-
one it. I am afraid that under these circumstances, no mat-
hibi what the intention of anybody is, that we are going to
ter up with putting too much emphasis on Exhibits 16 and
end 1. It is going to be in effect, a comment on the evidence.
16-
THE COURT: It is an exhibit before this Jury. I
ld state to the Jury the purposes for which it is being
cou

offered, but I don't want to do it, because it might be a comment on the evidence. I was merely going to call the Jury's attention to the fact that Exhibit 16 and 16-1 has already been around, and that these would be together, and only for the purpose of comparing the handwriting, so that they would just glance at it. That would be the purpose. I will tell you one thing I am going to do Gentlemen, I want to call these exhibits back here, and they will have to go together, and I want to call the Jury's attention to the fact that Exhibit 16 and 16-1 has already been introduced into evidence, and has been passed before the Jury, but I want the three exhibits to go down the line together and not separate. Mr. Ehlers, does your record show that all of this has taken place outside of the hearing of the Jury?

MR. EHLERS: Yes.

THE COURT: Very well. The reason the Court made the statement he did a while ago for the Jury, he noticed one of the jurors was reading Exhibit 16 and 16-1, and the Prosecuting [651] Attorney at the time the exhibits were identified, said he was only offering them for the purpose of comparison, inasmuch as Defendant will not agree that the Court may state that to the Jury, that it is only for the purpose of comparison of the handwriting, and the Court feels that such a statement by the Court would be a comment on the evidence, the Court asks that the three exhibits be brought back and then passed around together. I guess we could have gone ahead without passing this to the Jury at all. It would have been a question of argument or that the Jury could see at the time of argument, but the Jury has a right to see the Exhibits, and they were received in evidence, and it is just a question of saving time. I don't want to comment on the evidence, and I didn't intend to comment on the evidence. I was just merely trying to save time, after I

saw one Juror reading over again Exhibit 16 and 16-1. That Exhibit was read to the Jury by the Prosecuting Attorney, and then handed to the Jury, and some of the Jurors even read it as it was handed to the Jury before, and I didn't see any point in wasting all of the time of them reading it over again, and I think they thought it was probably a new exhibit and was checking it. I don't know what they thought. That is why I wanted them, as they go down the line, they can do with them whatever they want to. They can draw from them what they want to.

[652] MR. HENNELLY: Don't say anything further, they might do with them what they should do.

MR. RILEY: I would like to recall the Defendant for one more question.

THE COURT: Mr. Stidham, will you come back to the stand?

MR. RILEY: Mr. Stidham, you testified you went to Springfield on September 29th?

A. I believe that was the date.

Q. You recall what time you left Jefferson City? A. It was before noon.

Q. What time did you get there? A. It was in the late afternoon.

Q. Were you handcuffed? A. Yes, sir, I was.

Q. You had leg irons on? A. Not at the time I went to Springfield, no.

Q. I mean when you left Jefferson City on the trip to Springfield? A. Did we have leg irons on?

Q. Yes. A. No, they took the leg irons off immediately after we walked out of the Court Room, after arraignment.

Q. That is all.

MR. HENNELLY: That is all, come down.

[653] M. E. CURTIS,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Hennelly

Q. What is your name please sir? A. M. E. Curtis.

Q. You have been previously sworn to testify in this case, and what is your occupation sir? A. Records Clerk at the Medical Center of the Federal prisoners at Springfield, Missouri.

Q. That is the Federal Prison down there sir? A. It is a combination hospital and prison.

Q. And are you custodian of the records down there? A. I am.

Q. And do you keep the records of the people who have been there in the normal course of business? A. Those legally committed.

Q. And I will ask you sir, if pursuant to a subpoena duces tecum issued by His Honor out of this Court, did you bring with you one of those records? A. I did.

Q. Is that the record of one James Stidham? A. It is.

Q. And you are custodian of that record are you sir? A. Yes, sir.

Q. And this is a permanent record of your institution, is that right? [654] A. Yes, sir.

Q. Now, I am going to hand you what has been—

MR. HENNELLY: (Out of the hearing of the Jury) I think we are getting into a situation with respect to the introduction of this, aren't we? I think Your Honor received it for certain purposes, and then indicated that you would want to have me resubmit it.

THE COURT: I think for the purposes of being before the Jury, you can re-identify what this is, and it has previously been marked.

MR. RILEY: You are going to put the doctor on the stand?

MR. HENNELLY: Yes.

THE COURT: I think it probably should be in evidence anyway.

Q. Now sir, I am going to show you what has been marked for the purpose of identification, Defendant's Exhibit E-2, and I will ask you sir if that is one of the permanent records? A. It is.

Q. And is this the record of one James Stidham? A. It is.

Q. And I will ask you, this material which is written in ink, you know in whose handwriting that is? A. Dr. F. L. Halleck.

Q. And who is Dr. Halleck? A. He was the Public Health Doctor assigned to the Medical Center for the Federal prisoners at Springfield, Missouri.

[655] Q. Is he still with the institution? A. He is not.

Q. And do you have any idea who wrote this top part? A. No, it is one of the board at the institution made that part.

Q. One of the board? A. Guard.

Q. One of the guards? A. Yes, sir.

Q. I will ask leave to introduce E-2, Exhibit E-2.

MR. RILEY: I don't have any objection.

THE COURT: All right, it may be received in evidence.

Exhibit E-2, having been received in evidence, but not being in the hands of the Reporter at this time, is not copied into this record.

Q. Now then sir, I want to show you what has been marked, for the purpose of identification, as Defendant's

Exhibit E-1, is that part of the permanent records of the case of James Stidham sir? A. It is.

Q. And are these the records which are kept in the normal course of business at the hospital? A. Yes, sir.

Q. You are custodian of those records? A. Yes, sir.

[656] Q. And they are the permanent records, is that correct? A. Yes, sir.

Q. I am going to ask you sir, are you familiar with that handwriting? A. I am.

Q. Whose handwriting is that? A. Dr. Hatcock's.

Q. Who is Dr. Hatcock? A. He is the public health physician assigned to the Medical Center for Federal prisoners.

Q. And is he still down there? A. He is.

Q. I will ask leave to introduce this into the record.

MR. RILEY: You say Dr. Hatcock is here and is going to testify?

MR. HENNELLY: Yes.

MR. RILEY: If that is so, I have no objection.

THE COURT: All right, it may be received in evidence.

Exhibit E-1, having been received in evidence, but not being in the hands of the Reporter at this time, same is not copied into this record.

Q. I have no further questions.

Cross-Examination by Mr. Riley

Q. Will you mark this Exhibit 20?

[657] Reporter marked Exhibit 20, fingerprint record of Stidham.

Q. Mr. Curtis, I will show you what has been marked as Exhibit No. 20, consisting of two pages, and will ask you if that Exhibit is part of the same file which you just identified for Mr. Hennelly? A. It is a photostatic copy of the fingerprint, that is part of the file which I just referred to.

Q. And is that a part of your permanent record there at the Federal Prison in Springfield? A. I don't know just how to answer your question. The fingerprint chart in the back is a part of the permanent record, yes, and this here happens to be a photostatic copy of it.

Q. Have you got an original here? A. There is an original here. I don't see it right now.

MR. HENNELLY: I don't see any point in encumbering the record, I think for the purposes of introduction of that Exhibit Your Honor, it may be agreed that that is a photostat of the original. I don't mean to waive my objection to it.

THE COURT: Who prepared that sir?

A. I photostated it.

THE COURT: Who took the fingerprints?

A. My assistant, Mr. Patana.

THE COURT: Were you present?

[658] A. I was present in the office.

THE COURT: All right.

MR. RILEY: Now, I will ask you, on the second page, were you present when that information was taken?

A. Yes, I was.

Q. If the Court please, at this time we offer this exhibit in evidence.

MR. HENNELLY: The Defendant will object to it, if Your Honor please, for the reason that it is hearsay and that wouldn't tend to prove or disprove any issue in this case.

MR. RILEY: Was the Defendant present when this was prepared?

A. Not the photostat, no.

Q. I mean the material that is on there? A. Yes, sir.

Q. And was he there present when the information on the second page was taken? A. Stidham was present.

MR. HENNELLY: Still object to it for the reason that it contains certain hearsay testimony, and testimony, evidence which is totally irrelevant and immaterial and highly inflammatory, and only tends to bias and prejudice the minds of the Jury, and to introduce it under these circumstances would be a violation of the Constitutional Rights of the Defendant.

MR. RILEY: I offer it for impeachment purposes.

[659] THE COURT: Mr. Curtis, did you hear the Defendant give the information that is contained on the second page of Exhibit 20?

A. Mr. Patana, as I remember it, interrogated Stidham himself and recorded what description has been noted on that card.

THE COURT: Were you present there?

A. I was in the office all the time that the six of them were being processed. I didn't do any of the interrogation.

MR. RILEY: Did you hear Mr. Stidham give these answers?

A. I did.

THE COURT: All right, Exhibit 20 may be received in evidence.

Exhibit 20, having been received in evidence, the part which can be copied into this record, reads in words and figures as follows:

Fingerprint Record of James William Stidham.

Page 2.

Received—9-29-54-MCFP Mo. State Prisoner Trf. to MCFP

Crime—Robbery Sentence—25 yrs.

Date of Sentence—5-26-52 Sentence begins 5-26-52

Sentence expires—5-25-77

Good time sentence expires 5-25-71

Date of Birth—2-2-1920 Occupation—Auto mechanic

Birthplace—U.S.A. Nationality—American

Age 34 Complexion—Medium Height .....

Eyes—Brown Weight ..... Hair—Lt. Brown Build—Med. [660] Scars and marks—1. Tatt. word Frances vertical spelling forearm outer. 1. ragged cut scar between middle and little fingers palm side of hand.

Exhibit 20
LWE
7/20/55

This exhibit is also attached to the original of the transcript, the fingerprint record.

MR. RILEY: Mr. Curtis, on this, what is the birth date as shown by that exhibit of the Defendant, James William Stidham?

A. February 2nd, 1920.

Q. February 2nd, 1920? A. Yes.

Q. And what date was that information taken from him? A. Probably on September 30, 1954.

Q. And how old, after the question of age, what figure appears there? A. 34.

Q. And further on down in that exhibit, what scars or marks is shown on there? A. The word tattoo abbreviated and the word Frances, vertical spelling forearm outer, and that would be on the left arm. Then it says. ragged cut scar between middle and little fingers, [661] palm side of hand. That would be the left hand.

Q. It shows there that he had a ragged cut scar? A. That is right.

Q. Between the middle and the little fingers on the palm side of his left hand? A. Yes, sir.

Q. All right. Now, I will show you this, does the fingerprints of the Defendant James William Stidham's left hand appear on that? A. Yes.

Q. Now, will you show this, do you have to have the fingers extended straight to take the fingerprints? A. That is right.

Q. Now, if my two fingers were like that, and paralyzed like that, could you take the fingerprints of my little and middle fingers?

MR. HENNELLY: Object to the form of the question if Your Honor please.

THE COURT: Sustained.

Q. All right. If Stidham's middle finger, and left finger were paralyzed in a contracted position, could you have taken that fingerprint?

MR. HENNELLY: Object to the form of that question if Your Honor please.

THE COURT: Sustained. He may tell how he took them.

[662] Q. Will you tell how you taken them?

THE COURT: What his condition was.

A. It depends if they were jammed up in a position like that, it would be hard to print it, and it depends on the amount they could be flexed outward.

THE COURT: Wait just a minute, the question was how did you take them?

A. From this print here, it would indicate that they were taken in a normal course of events without difficulty.

MR. HENNELLY: Object to that, and ask that it be stricken and the Jury instructed to disregard it, and a mistrial declared for the reason it was not responsive and a conclusion on the part of the witness.

THE COURT: Sustained, except for the direction of a mistrial. The answer may be stricken, and the Jury is instructed to disregard it.

THE COURT: Mr. Curtis, who do you do, what did you do with Stidham's hand when you took the fingerprints, how were they taken, can you explain to this Jury how

you took the fingerprints, hold out your finger there, your hand, and show them how you did it, with this hand?

A. You just take the one finger individually at a time, and flex it outward and roll it on an ink pad and move it over to the blank fingerprint chart and roll it again. All fingers are taken in the same manner.

[663] THE COURT: And what part of the fingers are put on the ink pad and then placed on the fingerprint pad?

A. The terminal joint of each finger.

Q. Indicate to the Jury what you mean by that. A. The terminal joint.

Q. Of each finger? A. Yes, sir.

THE COURT: All right Mr. Riley, go ahead.

MR. RILEY: Now, you have there on that exhibit the print of all fingers at one time, do you not?

A. No, not all at one time. They are taken simultaneously, not simultaneously, but one following the other.

Q. How do you take these four? A. The four impressions are taken, and then the thumb.

Q. Will you show the Jury how you take this part right here. A. You take them in that position and then the other one afterwards.

THE COURT: Do that again.

A. Four of them taken simultaneously and then the thumb in the next sequence.

Q. Now, I will ask you to hold that up and point to the Jury which part of that represents Mr. Stidham's left hand when the four fingers were taken at the same time. A. The lower left hand corner, the four together, and then [664] the thumb.

Q. Now, could you take those prints together unless the hand was laid out flat?

MR. HENNELLY: Object to the form of that question if Your Honor please.

THE COURT: Sustained, it would be a conclusion of the witness. He may testify and has testified what he did and how it was done.

Q. I will ask you if Stidham's hand was laid out, left hand was laid out flat when you took these fingerprints? A. They were.

Q. That is all.

MR. HENNELLY: No further questions.

THE COURT: Can it be agreed that photostats can be furnished the Reporter for Exhibits E-1, E-2 and E-3, in place of the original exhibits. Those are the exhibits that were identified by this witness.

MR. RILEY: Yes. And State's Exhibit No. 20, and I think the record already shows—

THE COURT: The photostat of Exhibit 20 might likewise be furnished the Reporter. You can then be excused Mr. Curtis.

DR. THOMAS A. HATCOCK,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Hennelly

Q. What is your name please? [665] A. Thomas A. Hatcock.

Q. You are a physician, am I not correct Doctor? A. Yes, sir.

Q. What school or schools are you a graduate of?

MR. RILEY: We will admit the Doctor's qualifications.

THE COURT: All right, they have been admitted.

Q. That is quite all right. Where are you presently stationed? A. U. S. Medical Center, Federal Prison, Springfield, Missouri.

Q. U. S. Medical Center at Springfield, Missouri? A. Yes, sir.

Q. Federal Prison? A. Yes, sir.

Q. Now Doctor, I am going to ask you, excuse me, where are those photostatic exhibits, if you will please, that which has been accepted into evidence as Exhibit E-1, and I will ask you what that is Doctor? A. This is a consultation report in my handwriting, made according to my examination of the Defendant on September 30, 1954.

Q. Now Doctor, I am going to ask you, did you make an examination of this Defendant at that time? A. I did, insofar as his complaints were concerned at that time.

Q. I see. A. My examination was limited to [666] his complaints.

THE COURT: Maybe you had better turn so the Jury can hear you.

A. I examined him, his left arm and hand.

Q. Doctor, let me ask you this, with respect to this particular patient, was he put through the same normal routine that other patients would have been put through down there? A. No, he was not.

Q. He wasn't given the examination, the physical examination which was normally given, is that true? A. That is true.

Q. For the reason that this was a special situation, is that right? A. Yes, sir.

Q. Now Doctor, can you tell His Honor and this Jury what was the date that you made that—at least this limited examination of the Defendant? A. September 30, 1954.

Q. Now, can you tell us what your physical findings were Doctor? A. I think first I should mention the complaints at this time.

Q. Very well. A. At which I was asked to see him.

Q. Go ahead. A. Patient claimed an injury to [667] his left hand as a result of being suspended by a rope tied to his hands with his hands at his back. He com-

plained of weakness of the left ring and little fingers, and inability to forcibly flex and to extend those fingers. My examination revealed some evidence of weakness of these fingers, namely, the ring and little fingers of the left hand. Although there was ability to partially flex and extend these fingers, the function seemed to be weak and the muscles seemed to be weak. The patient also complained of numbness involved in these fingers, not an actual complete loss of sensation, but a numb feeling involving the little and ring fingers. Now, on the basis of these complaints, his story of his injury, and my findings which was based on these subjective symptoms, I felt that possibly he had a contusion of the ulnar nerve which is the nerve that supplies this particular area of the hand and fingers that he complained of.

Q. What was this date again Doctor? A. According to the record, September 30th.

Q. This was 1954, and you actually found yourself some difficulty in flexing those fingers and some weakness, didn't you? A. Well, you have to keep in mind the fact that these symptoms are subjective and are symptoms that may be present without showing external signs of injury, and is based pretty much on the patient's story.

[668] Q. Now, Doctor, independent of a patient's story, if you wanted to determine for yourself, independent of his story, whether or not there had been any actual numbness or any damage to the lower extremity, or to any of those fingers, what would be the way that you would do that? A. Well, it is a very difficult matter, in this particular type of case.

Q. Let me ask you this—

MR. RILEY: Let him answer the question. I would like for the witness to answer.

Q. I am sorry. A. You can have a very serious impairment of this nerve function without having any ex-

ternal evidence of it, that is any serious surface bruises or marks, and to determine whether or not those symptoms are bonafide symptoms, it is a pretty difficult matter. We go through the usual type of sensory palpations and getting the patient's reactions and in this case, he had a disturbance of the sensation in these fingers, which corresponded to the area narrated by this particular patient, and it was very suggestive to use. Now, aside from those findings, except in those cases where this result might be— I mean these findings might be the result of a remote injury, where you would find some slinging of the muscle of these fingers, while as I say, the diagnosis is based pretty much on subjective findings.

[669] Q. Doctor, would you say one of the methods in determining whether or not there is actual damage to the hand under those circumstances, that you would use the pinprick method? A. That is the common one used, commonly used.

Q. And tell His Honor and this Jury how that would be done?

MR. RILEY: Object unless he did it on this patient.

THE COURT: Sustained.

A. As I recall, I don't think I used an actual pin, but I used my hand to produce pinching and to produce a sensation and compared that over this involved area, supposedly involved area, with the normal area.

Q. All right. Now Doctor, I want to ask you, assuming if you will, that a man the age of this Defendant, and the weight of this Defendant, and prior to September 22nd, 1954, had no damage of any kind to his left hand, and assuming that on the 27th day of September, 1954, that he was handcuffed with his hands to his rear and handcuffed by his feet, and that a rope was placed on the handcuffs and that he was then lifted a distance from six to eight inches off of the ground, that he was suspended at first for a period of approximately fifteen minutes, and then

taken down, and assume further Doctor, that he was immediately thereafter put up again for a period of thirty to thirty-five minutes, and assuming further Doctor that there was, that he had pain in that hand, and that there was a shrinking of the ring [670] finger and the little finger—

MR. RILEY: If the Court please, he is including in the question some things which aren't in evidence. I don't recall any evidence of any shrinking.

Q. Withdraw that section then. I think it is in there, but I don't want to take the Court's time, I withdraw that section, and assume further that upon—

THE COURT: Eliminating the shrinking now.

Q. That is right, and assume further that on his admission to the hospital, that there was an absence of flexion and extension in those fingers, as well as anesthesia to pinprick and assume further that at the time you examined him on the 30th, that you still found some evidence of lack of flexion and weakness, I will ask you Doctor, whether or not in your medical opinion, based upon reasonable certainty, medical certainty, the condition you found when you examined him, could have been caused by being lifted in the method and manner that I have described on the 27th day of September, 1954? A. In my opinion, it could have.

Q. Could have been? A. Yes, sir.

Q. Now Doctor, I want to ask you, can you tell His Honor and this Jury just where that ulnar nerve runs, indicating on me on the left? [671] A. The ulnar nerve arises in the spinal cord at the neck level. It is composed of a number of fibers coming out and going in at different levels.

THE COURT: A little louder Doctor.

A. And it takes its course down through the upper arm pretty well under the muscle layers and courses down over the inner part of the elbow, and that point be-

coming rather superficial, and passing through the bony groove, which we all know as the funny bone area, and from there goes into the muscles of the forearm, through the wrist and goes down to the, and supplies the muscular and sensory sensation to the ring and little fingers.

Q. I have no further questions.

Cross-Examination by Mr. Riley

Q. Doctor, this nerve is commonly known as the crazy bone, isn't it, your elbow? A. Well, most people think they are hitting the bone, actually they are hitting this nerve at a superficial area, and they call it the crazy bone.

Q. Now, if your elbow, you can hit your elbow and damage that nerve without having any physical injury, couldn't you? A. That is quite true.

Q. And if you hit your elbow and damage that nerve, why it [672] would cause the loss of flexion in those two fingers, wouldn't it? A. If the injury is severe enough.

Q. Well, what is a contusion? A. Well, commonly called a bruise.

Q. A bruise? A. Yes, sir.

Q. Did you see any bruise on Stidham's left arm? A. I recall seeing no definite bruise on his left arm.

Q. Did you look? A. Yes, sir.

Q. Well then, the information here about his ability to flex it, you got most of that from Stidham himself, didn't you? A. Yes, as I pointed out a moment ago. As I noted in the previous testimony, the diagnosis of nerve injury in this Defendant, is dependent upon subjective findings.

Q. And then what is subjective findings? A. Symptoms that the patient complains of himself.

Q. And not something that you can see? A. Can't always be tied in with the objective evidence. In other words, the findings on physical examination.

Q. If you saw a contusion or a bruise, that would be an objective findings, wouldn't it? A. Yes, sir.

Q. And subjective symptoms are what the patient tells you [673] and not what you see? A. That is true.

Q. Now, your opinion in this case is based upon subjective findings, isn't it? A. To a great extent.

Q. You found no injury whatsoever? A. No signs of any bruises as I recall, or I have no notation of any in the original notes made at the time.

Q. You didn't make any notation of the scar or large cut? A. No, sir, I was aware of that. I recall it. I didn't make any notation of it. In my opinion, it played no part in the man's symptoms at the time.

Q. You didn't prescribe any treatment whatsoever? A. No, sir, I felt that it was probably a minor contusion and didn't call for any specific treatment and would probably clear up in passage of time.

Q. That is all.

Redirect Examination by Mr. Hennelly

Q. Doctor, is a pinprick examination to determine if ther is lack of anesthesia, would you say that is subjective matter or an objective matter? A. Well, your conclusions are based on the patient's reply to the type of sensation that he gets from it.

Q. If you are standing there watching him and you apply the [674] pinprick method, either to the lower extremity in a leg or hand, and there is no twitching or no reaction of any kind, would you say that that was an objective finding on the part of the physician? A. Yes.

Q. No further questions.

Recross-Examination by Mr. Riley

Q. You didn't use the pinprick? A. No.

Q. That is all.

Redirect Examination by Mr. Hennelly

Q. It was done when he entered by one of your other men, wasn't it Doctor?

THE COURT: If the Doctor knows.

A. I don't know.

MR. HENNELLY: Very well. I guess the record would speak for itself. That is good enough. Thank you very much. With that, the Defense rests Your Honor.

THE COURT: We will recess Gentlemen of the Jury, for the noon hour. There will probably be some additional testimony I understand from counsel, but it won't be very long and then the Court has to prepare the instructions in the case, and then there will be the argument of counsel, and so the case [675] should be submitted to you shortly after you return from your noon recess. During the noon recess, remember the previous instructions of the Court, the instructions the Court has given to you about not becoming separated from each other, or allowing anyone to talk to you about the case, or permitting anyone to talk to you about it. I will ask that the Sheriff take charge of the Jury then, and during the noon recess don't get separated and Mr. Sheriff return them to the Court Room and the Court will be in recess until One O'clock.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 429) Wednesday, July 20th, 1955, Regular July 1955 Term

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Now at this time, it is ordered by the Court that this cause be recessed for the Noon Recess. Now Noon Recess being over, trial in this cause is resumed and progresses in the hearing of the evidence to the conclusion thereof.

BEN MARKWAY,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. State your name please. A. Ben Markway.

Q. Mr. Markway, what position do you hold? [676] A. Sheriff of Cole County.

Q. And that is in Jefferson City? A. That is right.

Q. Mr. Markway, I will show you what has been marked as Exhibit G. You just keep it there, is that your signature on there? A. Yes, it is.

Q. Now, will you hold it up and show the Jury just where your signature appears? A. Right here, the third line.

Q. All right. Now Mr. Markway, are you a medical doctor? A. No, I am not.

Q. Have you ever had—

MR. HENNELLY: I am going to object to any further testimony on the part of this witness, for the reason that it is improper rebuttal evidence in chief, but since this evidence came in without objection, I don't see how it becomes the basis for any rebuttal testimony.

THE COURT: These exhibits weren't brought into the case until after the evidence in chief.

MR. RILEY: You brought them in.

THE COURT: They came up first upon the exhibit that you offered, and then the one that was offered immediately, or at the same time, or about the same time by the State. The objection will be overruled.

[677] Q. Now Mr. Markway, did you know Walter Lee Donnell? A. I do not know him, no, sir.

Q. Had you ever seen him? A. Not that I know of, until the night of, down at the Funeral Home.

Q. Where did you see his body? A. Well, I will take that back, I did see him, they said that was him out at the Penitentiary that night.

MR. HENNELLY: Object to that, that will be hearsay and a conclusion on the part of the witness.

THE COURT: Sustained.

Q. Where did you see the body? A. The body?

Q. Yes. A. Down at the Dulle Funeral Home.

Q. Did you examine the body? A. I did.

Q. And what examination did you make? A. I just examined it.

Q. Speak up loud. A. I examined his chest and his body. They had it covered and took the cover off and I examined his body and then they pulled him over on his side and let me look at his back.

Q. Did you notice any wounds on his body? A. Yes, sir, I did.

[678] Q. What condition were the wounds at the time you examined him?

MR. HENNELLY: Now, I am going to object for the reason that this again is improper rebuttal and certainly it is within the Court's discretion with respect to what rebuttal testimony will be introduced, but this is apparently an attempt to vary the terms of a written instrument, one that was offered in evidence, and received in evidence without objection, and I submit it is improper argument and if anything, it is evidence in chief.

THE COURT: Overruled, for the reason stated.

MR. HENNELLY: Very well.

Q. What condition were the wounds in when you examined him? A. When I examined the wounds, they were stitched back, they had stitches through them, and they were stabs or whatever you want to call them, in different places.

Q. Were they sewed up? A. They were.

Q. Now, did you make any further examination of the wounds, probing them or sticking an instrument in them? A. No, sir.

Q. Now Mr. Markway, I will ask you to look at this exhibit regarding this part up at the top there, that typewritten part, did you put that in there? A. No, I did not.

[679] Q. Did you ever type in anybody's name in that certificate? A. No, I did not. The only thing that was on there was, I wrote by longhand myself.

Q. Was that typewritten in there when that certificate was signed? A. No, it was not.

Q. Who put it in? A. Well, I am not positive, Mr. Dulle told me—

MR. HENNELLY: Object to that, that would be hearsay and a conclusion.

Q. If you don't know, say you don't know. A. I don't know.

Q. Now, were you at the Penitentiary when the other bodies were removed? A. I think I was. I was out at the Penitentiary, but I didn't see them being removed. I was there when the ambulances came, that is, in and out, and I went down and told them that the ambulances were there, but I didn't see them that I can recall, taking the bodies out.

Q. When was the first time you saw this Death Certificate as it is filled in now? A. The first time I saw it, I expect was a week ago today down at Union.

Q. That is all. A. Today a week.

[680] MR. HENNELLY: Now, under those circumstances, I ask that all that testimony be stricken for the reason it is totally irrelevant, immaterial and further for the reason that it is improper rebuttal testimony.

THE COURT: Overruled.

Cross-Examination by Mr. Hennelly

Q. Sheriff, how long have you been Sheriff of Cole County? A. Six and a half years.

Q. In the course of that time Sheriff, have you had reason and opportunity to see people who suffered from gunshot wounds? A. What is that?

Q. Have you seen people who suffered from gunshot wounds? A. Have I ever seen some committed?

Q. No. Have you seen people who suffered from gunshot wounds? A. I have seen some who committed suicide.

Q. You have seen some people that have been shot by themselves or by somebody else then? A. I have.

Q. Is that right? A. Yes, I have.

Q. And about how many people would you say that you have seen? A. That have been shot?

Q. Yes. A. That would be a little hard for [681] me, you mean shot and committed suicide?

Q. Either way, both. A. By themselves?

THE COURT: Shot, regardless of how they were shot or who they were shot by.

A. That would be a little hard to say, I would say fifteen or twenty.

MR. HENNELLY: Fifteen or twenty?

A. Yes, sir.

Q. Now then, this Official Death Certificate states that the cause of disease or condition directly leading to the death was by bullet wounds of a gun in unknown hands. Now, is it your testimony that you did not put that in there? A. No, I put this in there.

Q. You put that in there, is that right? A. Yes, sir.

Q. So that you sent to be put in the official record of the State of Missouri, a statement that the body of Walter Lee Donnell, that he had died as a result of bullet wounds in the hands of persons unknown, is that correct?

A. That is right.

Q. And is this your signature on both, Ben S. Markway? A. Yes, sir.

Q. And this next section, removal to National Cemetery at Nashville, Tennessee, is that your signature? [682] A. I don't think that is.

Q. When you stated that, when you signed this, that there was something that was left blank, what was that? A. All the typewritten in there, but Dulle said they—

Q. Object to this section as not being responsive and being hearsay.

THE COURT: Sustained. He just asked you what part you didn't put in there.

Q. What part—strike that. What was on there when you signed that Sheriff, this Certificate? A. Well, all this fine print was on there, and that is all, and when I signed it, that other was put in later.

Q. Everything was put in later? In other words, you tell this Court and Jury that what you did, was you signed a Death Certificate in blank, is that right? A. Except that what I wrote on there.

Q. Well, you, the only thing you put down was bullet wounds, is that right? A. That is right.

Q. And did you go and change this matter later on? A. I didn't get that.

Q. Have you ever changed this certificate? A. Yes, sir.

Q. And when did you change it? A. I changed it I think last Friday, Thursday or Friday after [683] I came back from Union.

Q. And was that at the direction of anyone in Cole County? A. I asked Mr. Riley if it would be a good thing for me to do that, and he said yes it would.

Q. Be a good thing for you to do that? A. Yes, sir.
Q. That is all.

Redirect Examination by Mr. Riley

Q. You don't know whose body it was that this death certificate was used on, do you, did you know that this was Donnell's body? A. No, I did not.

MR. HENNELLY: Object to the leading and suggestive question.

THE COURT: Overruled.

Q. That is all.

THE COURT: Just one moment, let me see those just a moment. That is all.

CLARENCE DIETZEL,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Mr. Dietzel, going back to the night of September 22nd, and the early morning hours and the morning hours of September 23rd, where were you, in what hall? A. I was in B Hall.

[684] Q. Now, is that above B basement? A. It is.

Q. I will ask you if you saw the defendant Stidham in B Hall that morning?

MR. HENNELLY: Object to that for the reason that this is a matter which has already been covered in the matter in chief. This witness already testified to it, and not proper rebuttal, and accumulative.

THE COURT: Just one moment.

MR. HENNELLY: Very well Your Honor.

THE COURT: On cross-examination, he testified that he saw him the next morning in B Hall. I don't recall that this is in evidence about the evening, this is the night you are referring to, the night of September 22nd?

MR. RILEY: Yes.

THE COURT: The objection will be overruled. He may inquire, because there has been some testimony by the Defendant as to where he spent the night.

Q. I will ask you if you saw the Defendant Stidham in B Hall? A. I did.

Q. During that night? A. I did.

Q. You know about what time it was? A. It was toward morning, toward daylight. It would have to [685] be a guess, exactly I couldn't state, it was between three and five o'clock, or about that time.

Q. Where were you? A. I was on the top walk on the south side of B Hall.

Q. Were you in a cell or out on a walk? A. I was in a cell.

Q. Who was with you? A. Noble was sitting in the door, beside of the door, and I was, they had me laying on a bed or a cot and there was several more inmates there, I don't know their names.

MR. HENNELLY: Object to this, this is not proper rebuttal, and it was specifically covered in the direct examination of this witness, and also in his cross-examination.

THE COURT: The witness has testified to some of these matters on direct examination is my recollection.

MR. RILEY: This witness never testified after they came upstairs.

THE COURT: All right, overruled, go ahead.

Q. Now, where did you see Stidham? A. In the cell that I was laying in, on top, the top walk of B Hall.

Q. Is that while you were with Noble? A. Yes.

Q. Did you see Stidham? A. He was in the cell, yes, he sat on my leg.

[686] Q. Did you see him? A. Yes, sir.

Q. Recognize him? A. Yes, sir.

Q. Did you talk to him? A. Yes, sir.
Q. Or did he talk to you? A. Yes.
Q. That is all.

Recross-Examination by Mr Hennelly

Q. Now Mr. Dietzel, when was this that you saw him? A. The morning of the 23rd after the evening of the 22nd.

Q. And what time of the morning was it? A. It was toward daylight, about, I couldn't give you the exact time.

Q. Was this after all of the Missouri State Highway Patrol had come in and everything? A. Yes, they were outside, because I heard them.

Q. Had they been inside of B basement or inside anyplace in B Hall by that time? A. I don't know.

Q. You don't know? A. No, I don't know.

Q. No further questions Mr. Dietzel.

MR. RILEY: That is all.

[687] LIEUTENANT W. S. BARTON,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Lieutenant Barton, I will ask you if you were up in B Hall during the night or early morning of September 23rd? A. Yes, sir, I was.

Q. Did you see the Defendant Stidham there? A. I did.

Q. Who was he with? A. He was with Hoover, Laster and DeLapp.

Q. What did you have with you when you went up there? A. Had a public address system.

Q. Did you have a conversation with any of the four that you have named? A. Yes.

Q. Without saying what you did? A. Yes.

Q. Who did you talk to? A. Talked to DeLapp.

Q. Now, where was Stidham in relation to the other three that you have named? A. Stidham was standing with the group.

Q. Who is the group? A. Well, that was Hoover, Laster, DeLapp and Stidham, the four of them.

Q. All right. Now then, what did they do while they was standing [688] in this group? A. While they was standing in this group, DeLapp came over to the lobby.

Q. Now, how far were they from you? A. Oh, they wasn't very far, I would say fifteen or twenty feet probably.

Q. All right. About what time was that? A. About three A.M.

Q. You say you had this public address system? A. We did.

Q. Was it used? A. It was by DeLapp.

Q. Was Stidham present when it was used? A. Standing on the flag just off of the lobby there about fifteen feet away.

Q. After DeLapp used this, where did DeLapp go? A. He went back to the group, went back on the B side.

Q. Went back to what group? A. To Laster and Stidham and Hoover.

MR. HENNELLY: Object to that section with respect to back to the group Your Honor, for the reason that that is a conclusion and an invasion of the province of the Jury, and the proper foundation has not been laid for such a statement Your Honor.

THE COURT: Overruled. He has named who he meant by the group. [689] Overruled.

Q. Now, what time was this Lieutenant? A. About three A.M.

Q. What date? A. On the morning of the 23rd.

Q. All right. Now Lieutenant, did you, were you present in the classification room on the occasion when Stidham was questioned? A. I was.

Q. What time was that? A. About eight A.M., eight P.M., rather, on the evening of the 23rd.

Q. Who was present? A. Sergeant Nash, Sergeant Barkley and Chaff of the Police Department, Sergeant Inman and I believe there could have been some more, but I do not know those.

Q. Were there fifteen officers in there? A. No, sir.

Q. Were you ever in that room with the Defendant Stidham and questioning him at three o'clock in the morning? A. Never was.

Q. How long was he in that room? A. Couldn't have been in there over fifteen or twenty minutes at the most.

Q. Do you know Olin Curtis? [690] A. I do.

Q. Is he with the Highway Patrol? A. He is.

Q. And what is his rank? A. He is a Sergeant.

Q. Where does he work? A. He works in the office out of Troop A, at Lee's Summit.

Q. Is he a desk Sergeant at Lee's Summit? A. Yes, sir.

Q. Where is Lee's Summit with respect to Kansas City? A. About twelve miles east and south of Kansas City on Highway 50.

Q. Were you in charge of the detail of the Highway Patrol in the Missouri State Penitentiary? A. I was.

Q. Was Sergeant Olin Curtis, of the Missouri State Highway Patrol in the Missouri State Penitentiary? A. No, sir, never was there.

Q. Do you know him personally? A. I do.

Q. That is all.

Recross-Examination by Mr. Hennelly

Q. Lieutenant, where are you stationed? A. Kirkwood.

[691] Q. You are stationed in Kirkwood, that is quite some distance from the Penitentiary also, isn't it? A. Yes, sir.

Q. Now Lieutenant, I am going to ask you if I didn't specifically ask you when you were testifying before, the next time you saw—the first time that you saw Stidham after you had gotten to the Penitentiary that night, you recall me asking you that? A. No, I don't recall that.

Q. Let me ask you if it isn't a fact that you told me that the first time that you saw him was when he was out, that it was the next morning? A. No.

Q. You didn't? A. That would have been the morning, that would have been about three A.M. I saw him at three A.M. and I saw him at the time we took B and C Hall.

Q. Now, had you ever seen Stidham before in your life? A. No.

Q. That was the first time you ever saw him? A. That is right.

Q. And how many men were up there at that time Lieutenant? A. What do you mean, men?

Q. How many men were there when this situation was going on? [692] A. You mean in the group, you mean inmates?

Q. Yes. A. I don't know.

Q. Were there a hundred of them? A. Yes, there were several hundred in there.

Q. You had never seen Stidham in your life, but you tell us today that you recall now having seen Stidham in the group of several hundred, is that right? A. I didn't say several hundred.

Q. How many were up there at that time? A. I said in this group of four.

Q. When I asked you with respect to the number that were there, didn't you indicate several hundred? A. You wanted to know how many was in that area.

Q. Yes, that is what I wanted to know. A. That covered the entire cell block at that time.

Q. Now, what cell block was that? A. B.

Q. Sir? A. B.

Q. That isn't shown on State's Exhibit 1, is it Lieutenant? A. No.

Q. Is that the place above State's Exhibit 1? A. That is right.

Q. Would that be the first floor above it? A. That is right.

[693] Q. And in this, in this particular section that you refer to, were these men all in cells or were they in the lobby, or where were they?

THE COURT: Which men are you talking about now?

Q. The two hundred men. A. I didn't say there was two hundred. I said there were several. I didn't count them. I don't know. I didn't have any idea.

Q. Did you at anytime since I have been questioning you mention two hundred men? A. I don't recall that.

Q. You don't recall that? A. No.

Q. Now, let me ask you this, when you were upstairs in B Hall Lieutenant, how many men were up there altogether? A. I don't know.

Q. Would you say now that there were as many as two hundred? A. It would only be a guess.

Q. Well, would you say there was that many? A. Yes, I would say there would be that many.

Q. And those two hundred men were confined in how big an area? A. They had the entire cell block.

Q. When you say a cell block now, would that be any bigger [694] than the front section of this Court Room? A. Oh, yes.

Q. Would it be any bigger than the entire Court Room? A. Yes.

Q. Would you tell us how big that section would be? A. I don't know how to describe the cell block to you in size. I could give you the approximate feet probably.

Q. Please. A. I would judge that the cell block would be about seventy-five feet wide and a hundred feet long or better.

Q. Seventy-five feet wide and a hundred feet long?

THE COURT: Seventy-five feet wide and a hundred feet long or better.

Q. Very well. Was that, was there some furniture in that place also, in that cell block? A. No, it was all thrown down in the door.

Q. Was there anything up there except those two hundred men? A. What do you mean, any steps?

Q. Was there any furniture up there at all besides that? A. Not that I recall, it was all piled up down in front of the door.

Q. And what was the closest distance that any men were to this position that you saw Stidham? A. Oh, they were in the same general area, but in that one group [695] there right off the door, there wasn't anybody in there.

Q. And you had never seen Stidham before in your life, but today you remember that he was there, is that right? A. I never will forget him.

Q. All right. You hadn't seen him before though, had you Lieutenant? A. No. He was very distinct, his features stood out quite well.

Q. I am going to ask you Lieutenant, the last time that we started this case in this Court Room, do you recall

my questioning you with respect to whether or not you knew a Sergeant Olin Curtis, you remember me asking you that at that time, if you knew him? A. I don't think you did. If you did, I could have told you that I did, because I knew him quite well.

Q. Well—

THE COURT: Just a minute—when are you talking about?

Q. I am talking about the first time the case was tried Your Honor.

THE COURT: All right, go ahead.

Q. Would you say you didn't tell the Court and Jury at that time that you didn't know Olin Curtis, didn't know who he was? A. I know I didn't tell the Jury that.

Q. You didn't tell us that? [696] A. No, sir.

Q. Now, with respect to this time that you were in a room in which the Defendant was questioned, I believe that you indicated that that was in the classification room, is that right? A. Yes, sir.

Q. And what officers do you recall being there? A. Sergeant Inman, Barkley, Sergeant Nash, Sergeant Chaff of the St. Louis Police Department, and myself. There could have been another officer or two, but I don't recall them. I do know those people were there.

Q. Could there have been as many as five more there? A. No.

Q. Couldn't have been? A. No.

Q. There was at least five that you know of though? A. The ones that I have named.

Q. Now, was the Defendant questioned at that time with respect to this crime? A. Yes, sir, to a certain extent, not much.

Q. No further questions.

MR. RILEY: That is all.

[697] OFFICER BILLINGS,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Officer Billings, you have been sworn in this case? A. Yes, sir.

THE COURT: Yes, previously sworn.

Q. I will ask you if you recognize State's Exhibit No. 17? A. Yes, I do.

Q. Is your photograph shown there? A. Yes, sir.

Q. And do you know where that place is? A. That is in the Court Room at the Cole County, Jefferson City Court House.

Q. And you know what day that was taken on? A. That was on the 29th of September.

Q. What year? A. 1954.

Q. Do you recall, or do you know what day Stidham and the others were taken to Springfield? A. On the 29th.

Q. Was that photograph taken before they went to Springfield? A. About twenty minutes before they left.

Q. And do you see Stidham in the photograph? A. Yes, sir, standing next to me.

Q. At this time Your Honor, we offer State's Exhibit No. 17, and with the Court's permission to cut that part of it off.

[698] THE COURT: You offer to cut that part of it off which shows the others, now this is outside of the hearing of the Jury Mr. Ehlers, and let the record so show. By others, you mean the other Defendants charged with this Defendant?

MR. RILEY: Yes, those are the co-defendants, those that have on the prison attire.

THE COURT: Now, you propose to leave the other half in there?

MR. RILEY: Yes, this half here, just the part that is showing the Defendant.

MR. HENNELLY: The Defendant will object to it for the reason that it is hearsay and not proper rebuttal, doesn't tend to prove or disprove any evidence in the case. If anything, it is evidence in chief, and the proper foundation has not been laid for its introduction, and for the reason that it contains certain other matters of hearsay, and to introduce it under these circumstances would only bias and prejudice the rights of this Defendant, and take away from him certain of his Constitutional Rights.

THE COURT: All right, get your scissors. I want the Reporter to mark on the back of the part that is cut off, Exhibit 17-1. Now then, the objection—the record may show the objection is overruled and Exhibit 17 less Exhibit 17-1 that has been cut off, has been received in evidence, and the part cut off is not received in evidence, and it can be [699] handed to the Jury.

Exhibit 17, having been received in evidence, being a photograph, is attached to the original of this transcript.

Q. Officer, for the identification for the Jury, will you point out to the Jury where you are on that photograph, hold that photograph up.

A. Right here.

Q. The uniformed officer there? A. Yes.

Q. And who is the next man there? A. To my right is Stidham.

Q. You are standing to Stidham's left? A. Yes, sir.

Q. That is Stidham's left hand shown there in the photograph? A. Yes, sir.

Q. That is all.

Recross-Examination by Mr. Hennelly

Q. Officer Billings, were you present when there were some pictures taken of the Defendant and other convicts, when they were going down to Springfield on a bus? A. Yes, sir.

Q. Have you seen that picture anyplace? A. No.

Q. Did you ever see a copy of that picture in the course of [700] this investigation? A. No, sir.

Q. You don't have a copy of it, do you? A. No.

Q. Do you know where we could get a copy of that picture? A. I may have one if you want to go to my house and see.

Q. I have no further questions.

Redirect Examination by Mr. Riley

Q. Mr. Billings, the picture you are speaking of is the one you saw in the newspaper? A. Yes, sir.

Q. They aren't photographs that we took, are they? A. No, sir, that was in the Jefferson City paper.

Q. That is all.

MR. RILEY: State rests.

MR. HENNELLY: I want to renew the two motions that I previously made at the close of all the evidence, the Defendant's Motion, the Motion to the Court to instruct the Jury to return a special judgment of acquittal. And at the close of all the evidence, the Defendant moves the Court to instruct the Jury to return a judgment of acquittal.

THE COURT: Overruled.

And thereafter towit: On the same day, the following order was entered of record:

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[701] Circuit Court Record, Butler County, Missouri (Book 62, page 429) Wednesday, July 20th, 1955, Regular July 1955 Term

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Now comes the defendant by counsel, and renews two Motions for Reduction of Charge and for Acquittal,

at the close of the whole case, which are refused and overruled by the Court. Defendant objects and excepts and continues to object and except to the rulings of the Court.

MR. HENNELLY: The Defendant objects to Instruction No. 3 for the reason that it is too vague, indefinite and speculative, and it is a comment on the evidence, and it is incomplete and inaccurate statement of the law, and does not purport to instruct on all of the law relative to the law on circumstantial evidence. The last sentence of this instruction beginning with, "Crime may be proven by circumstantial evidence", does not with sufficient particularity indicate whether or not the Court is referring to direct evidence or to circumstantial evidence. The Defendant objects to Instruction No. 4, for the reason that it is a comment on the evidence, that it does not sufficiently and accurately describe and define the terms "Felonious, wilfully, deliberately, premeditatedly and malice and malice aforethought". The Defendant further objects to this instruction for the reason that there has been no evidence [702] in this case tying the Defendant in with any of the persons mentioned, either Rollie Laster, Hoover, Edward Kenton, and Jackie Lee Noble and John William DeLapp, or Joseph Vidauri, and for the further reason that it is too vague, indefinite, and speculative, and gives the Jury a roving commission, and in fact ties them down to a verdict of guilty. The Defendant further objects for the reason that the instruction does not indicate that if the Defendant did not conspire with all of these Defendants previously mentioned, that then the Defendant should be acquitted and for the further reason that it does not define with sufficient particularity the crime of murder in the first degree. The Defendant objects to Instruction No. 5 for the reason that it is incomplete, inaccurate, indefinite statement, is not a complete

statement of the law and a comment on the evidence. The same objection for No. 6, and add this to No. 6. The Defendant further objects to Instruction No. 6 for the reason that it is a shift of the burden of proof and does not make any reference to the fact that the Jury has to be satisfied beyond a reasonable doubt as to whether or not this statement was voluntary. The Defendant further objects to this instruction with particular emphasis on the last section beginning with the statement, "The Jury must consider such statement and you should give it such weight as you believe it deserves in arriving at your verdict.", for the reason that [703] that is a comment on the evidence, and is a direction to the Jury, not warranted by the evidence, and in effect invalidates the rest of the instruction. The Defendant objects to Instruction No. 7 for the reason that that is a comment on the evidence with emphasis and points up to the fact that this Defendant has been previously convicted and this is particularly important in the light of the fact that two other witnesses for the State have been previously convicted of crimes and that the instruction fails to make any reference to their previous convictions. The Defendant objects to Instruction No. 8 for the reason that it is inaccurate, insufficient statement of the law and does not purport to instruct in all of the law relative thereto, and is a comment on the evidence.

THE COURT: As to Instruction No. 7, previous convictions—

MR. HENNELLY: The Defendant will specifically move the Court and request the Court not to give Instruction No. 7 with respect to the previous convictions of the Defendant.

THE COURT: And does not request it?

MR. HENNELLY: And does not request it, and under those circumstances—

THE COURT: Then the record may show Instruction No. 7 will be withdrawn and not given, and I will mark it refused.

MR. HENNELLY: All right Judge.

THE COURT: I mean mark it withdrawn.

[704] MR. RILEY: At the request of the Defendant.

MR. HENNELLY: Yes, that is all right.

INSTRUCTIONS GIVEN

Instruction No. 1

The State of Missouri, by the Indictment in this case, charges the defendant with a criminal offense against the laws of the State of Missouri. He pleads not guilty, thereby raising an issue of fact between the State of Missouri and himself, which you, the jury, are to determine from all the facts and circumstances in the case.

It is the duty of the Court to instruct you on all questions of law arising in this case, and it is your duty to receive such instructions as the law of the case, and to find the defendant guilty or not guilty, according to the law as declared by the Court and the evidence as you have received it under the direction of the Court.

Given
7-20-55
R.H.W.

Instruction No. 2

The Indictment contains the mere formal statement of the charge, but it is not to be taken as any evidence of defendant's guilt.

The law presumes the defendant to be innocent, and this [705] presumption continues until it has been overcome by evidence which establishes his guilt to your satis-

faction and beyond a reasonable doubt; and the burden of proving his guilt rests with the State.

If, however, this presumption has been overcome by the evidence and the guilt of the defendant established beyond a reasonable doubt, your duty is to convict.

If, upon consideration of all the evidence, you have a reasonable doubt of the defendant's guilt, you should acquit; but a doubt to authorize an acquittal on that ground ought to be a substantial doubt touching the defendant's guilt, and not a mere possibility of his innocence.

Given
7-20-55
R.H.W.

Instruction No. 3

The Court instructs the jury that evidence is of two kinds, direct and circumstantial. Direct evidence is when a witness testifies directly of his own knowledge of the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances in a certain case, from which the jury may infer other and connected facts which usually and reasonably follow, according to the common experience of mankind. Crime may be proven by circumstantial evidence, as well as by direct testimony of eye witnesses, [706] but the facts and circumstances in evidence should be consistent with each other, and consistent with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence.

Given
7-20-55
R.H.W.

Instruction No. 4

"Felonious" means wickedly and against the admonition of the law.

"Wilfully" as used in these instructions, means intentionally, not accidentally.

"Deliberately" means considered and reflected upon. An act committed in the cool state of the blood, with a conscious purpose to kill, and not under the influence of a violent passion suddenly aroused by some lawful or just cause of provocation, is committed deliberately.

"Premeditatedly" means thought of beforehand for any length of time, however short the time.

"Malice", in its legal sense, and as used in these instructions, does not mean mere spite, ill will, hatred or dislike, as it is ordinarily understood, but it means that condition of the mind which prompts a person intentionally to take the life of another without just cause, justification or excuse, and signifies a state of disposition that shows a [707] heart regardless of social duty and fatally bent on mischief.

"Malice aforethought" means malice with premeditation.

Bearing in mind these definitions and those included in the other instructions, the court instructs the jury that if you believe and find from the evidence, beyond a reasonable doubt, that Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner by the means hereafter set forth in this instruction, and if you believe and find from the evidence, beyond a

reasonable doubt, that pursuant to such a conspiracy and agreement those aforesaid persons, acting in concert and together, on September 22, 1954, in Cole County, Missouri, wilfully, deliberately, premeditatedly, and with malice aforethought did make an assault upon Walter Lee Donnell, and then and there did wilfully, deliberately, premeditatedly, and with malice aforethought forcibly strike hit, stab, cut, and beat Walter Lee Donnell in and upon his face, head, and body, with a sledge hammer, and a knife, and another sharp instrument or dagger, if you so find, thereby giving Walter Lee Donnell about his face, head, and body, mortal wounds from the effects of which he died on September 22, 1954, if you so find, and if you further believe and find from the evidence, [708] and beyond a reasonable doubt, that the defendant, James William Stidham, at the time of such killing and murdering, was a member of the conspiracy and agreement aforesaid and theretofore had conspired and agreed with Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri, to aid, abet, assist or encourage them in the killing and murdering of Walter Lee Donnell at the time and place and in the manner and by the means aforesaid, and if you further believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, pursuant to such conspiracy and agreement, was actually present during the killing and murdering aforesaid of Walter Lee Donnell, and that he knew of the felonious purpose and intent of Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph Vidauri to kill and murder Walter Lee Donnell as aforesaid, and that James William Stidham then and there knowingly and intentionally aided, abetted, assisted, or encouraged the aforesaid persons, or any of them, in the aforesaid killing and murdering, then you should

find the defendant, James William Stidham, guilty of Murder in the First Degree and by your verdict so say.

And unless you do so find the facts to be in every respect as above stated, you must find the defendant, James William Stidham, not guilty and by your verdict so say.

[709] If you find the defendant, James William Stidham, guilty of Murder in the First Degree, you will assess his punishment at death or at imprisonment in the state Penitentiary during his natural life.

Given
7-20-55
R.H.W.

Instruction No. 5

The Court instructs the jury that, if you believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, and William R. Hoover, Rollie Laster, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner and by the means set forth in Instruction No. 4, then the act of either of them pursuant to such conspiracy and agreement to kill and murder Walter Lee Donnell would be in law the act of each one so conspiring and agreeing.

The word "Conspiracy", as used in these instructions, means a common agreement and understanding between two or more persons which is formed for the purpose of committing and doing by their joint efforts some criminal act.

The Court instructs the jury that all persons are principals who are guilty of acting in concert and together [710] in the commission of a crime. When a crime is ac-

tually committed by one or more persons and another person is actually present, and, knowing of the felonious purpose and intent of the person or persons committing the crime, he knowingly and intentionally aids, abets, assists or encourages the person or persons actually committing the crime in the commission of the same, then such person so knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons actually committing the crime in the commission of the same is a principal and he is equally guilty with the person or persons who actually commits the crime.

However, you are further instructed that the mere presence of a person at the time and place of the commission of a crime by another or others is not alone sufficient to justify finding him in any manner responsible for the commission of such crime. On the contrary, before such person can be found in any manner responsible for the commission of such crime, the evidence in the case must show, beyond a reasonable doubt, not only that such person was actually present at the commission of such crime, but also that such person knew of the felonious purpose and intent on the part of the person or persons actually committing the crime, and that he then and there was knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons [711] committing the crime in the commission of the same.

Given
7-20-55
R.H.W.

Instruction No. 6

The Court instructs the jury that before any alleged statement can be valid, and before you can even consider it, it must have been made voluntarily, that is to say, without anyone having offered to the person who is claimed to

have made such a statement any hope of leniency or reward of any kind for making such statement, and without anyone making any threat or doing any violence to the person claimed to have made any such statement in order to induce or force him to confess.

If the jury does not believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury should entirely disregard such statement in arriving at your verdict.

If, however, the jury does believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury must consider such statement and you should give it such weight as you believe it deserves in arriving at your verdict.

Given
7-20-55
R.H.W.

[712] Instruction No. 8

The Court instructs the jury that you are the sole judges of the credibility of the witnesses, and of the weight and value to be given to their testimony.

In determining the credit you will give to a witness, and the weight and value you will attach to his testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial; the motives actuating the witness in testifying, if any, his relation to or feelings for or against the defendant or the State, if any, the probability or improbability of his statements, the opportunity he had to observe and to be informed as to the matters

respecting which he gives testimony, and his inclination to speak truthfully or otherwise as to the matters within his knowledge. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit and to his testimony such weight and value as you deem proper.

Given
7-20-55
R.H.W.

Instruction No. 9

In this case it is essential to a verdict that the entire jury of twelve agree upon any verdict the jury may [713] render. Your verdict when so agreed upon must be written on a separate sheet of paper, and not upon any of these instructions, and must be signed by the Foreman of the jury.

Given
7-20-55
R.H.W.

INSTRUCTIONS WITHDRAWN

Instruction No. 7

The Court instructs the jury that any evidence that the defendant may have been previously convicted of an offense against the laws of the State of Missouri is not evidence on any issue in this case, except insofar as you may find such evidence of prior conviction may tend to bear upon the credibility of the defendant, and the jury should consider such evidence only insofar as it may in the opinion of the jury tend to bear upon the credibility of the de-

fendant, and the jury will consider it for no other purpose in this case.

Withdrawn at request
of Defendant.
7-20-55
R.H.W.

The above instructions were read to the Jury by the Court.

MR. REX HENSON: If the Court please—

THE COURT: Mr. Henson.

MR. HENSON: Gentlemen of the Jury, as the Court has stated [714] to you, the proceedings in a case of this type or any criminal case for that matter, is for the State to make an opening argument. The defense counsel will make his argument and then for the State to close with a rebuttal, which in this instance will be presented by the Prosecuting Attorney of Cole County, Mr. Riley. I know you gentlemen have suffered through nearly three days of heat and lots of testimony here and for that reason, we will be as brief as possible, and I will try not to take too much of your time. I feel in this case that I am in a peculiar situation, because I am much in the same position as the members of the Jury Panel are. As this testimony came to you from the witness stand and you heard it for the first time, I also heard it for the first time, because I was not into this case until it came into this County, and I came in to assist Mr. Riley, which is my duty as Prosecuting Attorney of this County. So as I discuss this case with you, and the evidence as it came to you from the stand, I will be discussing a lot of it, practically all of it, from the same standpoint as you heard it, because I heard it only one time. I would like to point this out at the beginning. During the time that you heard this testimony, and there has been a lot of it, I had to sit there and listen

to it too, and try to keep notes on it, and there may be times, as I discuss this testimony with you, that I might misquote or misrepresent some [715] of it, and I want you to understand at this time that it will be merely an oversight and will not be done intentionally. This man Stidham is charged in the indictment by the Cole County Grand Jury with Murder in the First Degree. That is the only charge against him, and the only one you will consider in this case as to whether he is guilty of Murder in the First Degree, or whether he is not guilty, according to the instructions given to you by the Court as you apply the evidence as it came from the stand to that law. The State feels, and I feel personally that everything has been done both for the State and for the Defendant, through his attorney, Mr. Hennelly, that could be done in a case of this type, and that all of the evidence that could be brought to you on both sides, has been brought and presented to you in the best manner that it could be presented. I believe Mr. Riley and Mr. Hennelly have done that. Now, let's take the evidence that the State brought to you here in this case and discuss it briefly. When a man is charged with murder, with taking the life of another human being, first the State has to prove that there is a dead body. We have done that in this case. They have to prove the identity of that dead body. They have to prove the cause of death, that he met his death, his death was the result of the violence, or whatever might have been done to him by the persons charged with his murder. Now, the first day of this trial was consumed [716] mainly by these witnesses that the State brought, proving that Walter Lee Donnell died in the State Prison in Jefferson City, in Cole County, on September 22nd, 1954. The other testimony showed that he died of stab wounds, some in the front, from instruments like a knife and some in the back from round sharp instrument, and from a blow on the head

crushing the right side, inflicting a mortal wound to the brain, and that there were other abrasions about his body. We don't think that there is any question of any of the testimony in this case, but what this man was Walter Lee Donnell. There has been no evidence put on by the defense that it wasn't Donnell, and no evidence to show that he died from any other wounds, other than the external violence that he received there in his cell in Death Row on September 22nd, 1954. We think that question is settled. Now, you come down to the question as to whether this man here, this man Stidham, who stands charged here with this crime, is one of the men who entered into this conspiracy and went into his cell and killed this man on the night in question. This gentleman is the sole question and the main question in this lawsuit. The State says he did, and he says he didn't. There is your issue right there. Now, what did we bring to the stand, what did the State bring to the stand in the way of evidence, to show you that this man died at the hands of this man, and his co-conspirators. You must realize from the [717] outset that this crime was committed during a riot at the Missouri State Penitentiary, and you can call upon your common knowledge and your common horse sense that the authorities in piecing the evidence together, that it was, must necessarily be piece meal. It is not like a crime committed down on the streets in Poplar Bluff or in some other city. It was committed in the State Prison during a riot. Now, they brought these witnesses to the stand, two convicts, a guard, and these six or seven officers who testified about this man's confession, to show you that he was there, that he went down there to Death Row, into the cell at the time this murder was committed; that he was back and forth in and out of there several times, and that he made these threats against Donnell for being a snitch and for being a rat and that he was going to kill him.

All that fits in together. I am satisfied in my own mind that Mr. Riley would never have come here and presented this case—

MR. HENNELLY: I certainly object to that, and ask that it be stricken and the Jury instructed to disregard it and a mistrial declared for the reason it is an opinion of counsel and outside of the record.

THE COURT: Will counsel come up here and state to me his statement, his statement wasn't finished. You said you were satisfied in your own mind—

(Out of the hearing of the Jury)

[718] MR. HENSON:: That Mr. Riley, that is as far as I got.

THE COURT: Now, what were you intending to say?

MR. HENSON: That Mr. Riley wouldn't have presented this case if his sole testimony was furnished by the two convicts who testified for the State.

MR. HENNELLY: That is getting pretty close.

THE COURT: Let the objection be sustained.

MR. HENSON: Now let's take for just a moment Gentlemen, and go over this testimony that the State presented here to you on what happened down there that night, what was seen and what this Defendant did that night, the night of the riot. You recall the testimony I believe of this guard Dietzel who came here on the witness stand, who testified about the riot starting somewhere around six-thirty on the evening of September 22nd. You will also recall that, and I am pointing this out to you on account of instructions by the Court, because of this conspiracy. You will recall the statement that Dietzel made from the witness stand about the conversation between DeLapp and this other group of men he testified about, who came down there to get Stidham out of Death Row. You will recall that he was standing there back in this direction, back in there, and I direct your attention to Exhibit 1,

back here between Gate No. 2 and Gate No. 3, going into Death Row, between this group of men headed by DeLapp, and Stidham back here in his cell somewhere along here [719] on this side. I forget just exactly where it was. He was standing there where he could see and where he could hear what was going on. This is a guard in the Missouri State Penitentiary, and he says that DeLapp hollered back to Stidham and there was some conversation, you will remember exactly what it was, about getting him out of there, and getting on with their business, or whatever it was, and I won't try to go over that, because I can't remember it verbatim. There was never any testimony on his part about any conversation between those men and any other inmates along Death Row on that side. It was all with Stidham back there, and they called him "Slick", "Slick" Stidham, and he knew him as "Slick" Stidham, and these men talked to him back there and said they would have him out of there; that they worked on that door there first, the first door and the second door and the third door. That it went on there for quite a time, thirty or forty or fifty minutes, or maybe an hour or more, that they worked on these three doors to go back there and get this Defendant out of Death Row, no, not the rest of them, but this man. And then what did they do when they got him out? Creighton told you about it back there. Of course Creighton is a convict and he has been convicted, but did you notice that his story dovetailed into the story that these other witnesses have told. It fit into what they told you. It fit in to what [720] Herman Trout told you. It fit into what this guard Dietzel told you, his story fit; that they came back there to his cell, and he testified about these threats, these threats that this guard Dietzel told you about. Herman Trout told you about going back down there, what does the Defendant say about this. Look at his story now. His story is that when he went out of there, when these boys came down there and turned him

out, and he went out of the basement out here where Death Row is located, that he went upstairs and he didn't come back anymore. That was the last time that he was there. Trout saw him down there. Creighton saw him down there and the guard saw him down there.

MR. HENNELLY: Object for the reason that is outside of the record, with respect to the guard, Mr. Dietzel, the last section.

MR. HENSON: As I remember the testimony—

THE COURT: The objection will be overruled, with this statement of course to the Jury. Gentlemen of the Jury, you are the judges of the evidence, and the credibility of the evidence, and the weight of the evidence, and you will recall the evidence, and you are the sole judges of the evidence. The argument of counsel in this case, I may say this at this time, and it will be included for any other time that there may be some objection raised during the argument of the case. The argument of counsel is for the purpose of helping [721] and assisting and aiding you in recalling and recounting the testimony and in the application of that testimony to the instructions of the Court, that in the final analysis you are the judges of the testimony and you will be guided by the testimony as you remember it. You have about ten minutes left, nine or ten.

MR. HENSON: Now, there is one other very main and important issue in this case, and a very important piece of evidence that I wish to discuss with you in the few minutes that I have left, and that is the Exhibit 16 and 16-1, which we have presented, the State has presented to you as the confession. The statement signed by this defendant Stidham on the 27th day of September, 1954, in the recreation room there at the State Prison. I want to point this out to you. If you believe this man's story that he was tortured and beat and made this confession involuntarily, then as told you by the Court, you are not to

take it into consideration in deciding this case. We are satisfied beyond any doubt that this confession is voluntary and told you by these six officers—

MR. HENNELLY: Object to that, and ask that that be stricken, and the Jury instructed to disregard it and mistrial declared as an opinion of counsel.

THE COURT: The objection will be sustained. That part of the statement as to his satisfaction, being satisfied, or some [722] such statement made by the Prosecuting Attorney, is to be disregarded by the Jury in the consideration of this case. Gentlemen of the Jury, you are to be guided by your own opinion of the testimony. All right, the request for a mistrial is denied and the cause may proceed.

MR. HENSON: I don't recall the names of all these officers, Lieutenant Eitzman, Overbeck, Billings and these four officers from St. Louis, they were down there in this recreation room according to this testimony, with two members of the Highway Patrol, this Lieutenant from Cape Girardeau and Caldwell from Fredericktown. Now everybody knows that once in a while you get ahold of a bad officer. You might get ahold of two bad officers. There have been times in the past, and there will probably be times in the future when some officers, bad officers will take some man out and give him a beating in order to get a confession, but look at it from this standpoint. Here are four men, four men who have had long service with the St. Louis Police Department, who were not only in there together at the time this statement was made, they were in there with a Sergeant from the Highway Patrol down here from Fredericktown. They were in there with a man from Cape Girardeau. Every one of those officers testified that they knew that if they beat this man, that if they tortured him any way at all, that they were liable to be prosecuted under the Federal Laws of our [723] country,

and yet these six men, two of them who never did work together with these boys in St. Louis, took the chance of being prosecuted themselves by all six going in there and hurting this boy and torturing him there as he said from the witness stand. Are you going to believe that? Then he says that they took him by the arms back here, call on your common judgment for a few minutes; that they put these handcuffs on him, that they pulled him up from the ceiling with a rope and let him hang there for fifteen minutes, then down for a short period of time, and back up for something in the neighborhood of thirty-five minutes, or a total of fifty minutes, and when he went to Springfield three days later, there were no bruises on his left hand, which was paralyzed he said, partially paralyzed. One of the doctors there that examined him there in this report said that it could be caused by this old scar down between his hand. Don't you know if that happened to that boy that if that rope was put on those handcuffs and he was pulled up like that, that he never could have stood that. He said he stood, when he got down here in front and showed you, don't you know it would have tilted him over and his head down to the floor. Don't you know that it would not only have injured his ulnar nerve, it would have injured every nerve he has got in his body and wrenched his arms out of the sockets if he had hung there for fifty minutes suspended [724] with his arm to his back? That is the kind of story he tries to get you to believe. Now, there is one other thing I want to tell you in closing, you know there are some things in the trial of a case that will make impressions on one person, and some that will make some on another, and you will recall the testimony by this Trooper up at Fredericktown, Caldwell, he says that after this statement was made, that he asked this boy, Slick Stidham, he asked him why he did it, or something to that effect, and he told him he did it

because he was a snitch, because he was a rat, and you will remember something else that he said, he says you are living under—living your life under a different code than I am living, than I live mine. I respect your code, whether you do mine or not. You know what a code is, a code is a rule of living. We have codes of criminal procedure and codes of civil procedure. They have a code of the hills you know. That refers to the rule that you live by. I think that expression stuck out with me more than anything else, this boy lives under a code. He lives under the convict's code. He lives under a code that says if you go and inform on a fellow prisoner and if you go and inform on a man and cause him to go to the penitentiary, then your sentence is death. That is what his code is, that is what he told this Trooper in so many words. If a man goes and informs on his fellowman his sentence is death. That is the [725] code he lives under. Do you know what the code of society is? The code of society is this, that if you take the life of a fellow man, that if you take it upon yourself to try him, sentence him, and convict him, and hang him, kill, murder him on the spot, then your sentence is death because that is the code of decency. The code of law and the code of society. There is just one code, just one code that the convict understands, and that is the code of death, because how are you going to have law enforcement, how are you going to have decency if the code of the convict carries a heavier punishment than the code of decency. How are you going to do it? That is all the understanding, that is the only way that the code of decency, the code of society will ever push down the code of a convict, is to make your code just as strong or stronger than the one he has got, and I submit to you that unless that is done, the code of the convict will take all of us before too long. Thank you very much.

MR. HENNELLY: May it please the Court, Your Honor?

THE COURT: Mr. Hennelly.

MR. HENNELLY: Mr. Riley, Mr. Henson, is not here, and you gentlemen of this Jury. I think that when counsel said, talking about that code, he lost his case. He lost his case when he talked about the code because if you consider the question of the code, you have got to say in your own heart [726] and conscience that this boy did not voluntarily make this statement, and I will tell you about it in a minute. When those statements were made to you about that code, I saw some of you light up, and I know that when you read this statement, then you know that it couldn't have happened that way. Let me say at the very outset that I thank you for the attention that you have given this case. I know that it is not an easy matter to leave your homes and leave your families and to sit through this type of matter. We have all done it. Let me say in addition that if I have done anything since the time this trial began to cause you to feel unfriendly toward me, if I have been too enthusiastic, if I have been too impetuous in the defense of this man, well then you take it out on me, but don't take it out on him. I was appointed to defend this man by Judge Blair in Jefferson City. I am going to tell you in all sincerity, and with all sincerity that I can muster, that there has never been a more noble cause, for this is not the case of James Stidham, this is the cause of James Stidham. Now my friends, when we began, there were thirty-two jurors here, and I asked everyone of you a series of questions. I asked you first of all if you could be fair and if you could be square. I asked you if you had anything at all against this man. I asked you if there was anything in your heart or your mind or your conscience that would keep you from giving [727] him a fair deal, and all any one of you had to do was to raise your hand and say, I can't be fair, I can't be square, and you

would have been out of here. Now, I took you at your word. And when we got through, when I got finished, the State took ten names from that list and there were twenty-four names left. The twenty-four names were given to me and I took some other names off.

MR. RILEY: The State only got six cut.

MR. HENNELLY: I am sorry, I am confused with the County.

THE COURT: All right.

MR. HENNELLY: But in any event, when the list was given to me, I struck the last names off, and you twelve people are the people who are now listening to this case, and this is the last time anybody is going to be able to speak for James Stidham. When I get finished, the State is going to close, and then there isn't going to be anybody else speak for him. I don't have anybody with me. I am going to tell you that I have been fighting for him since we began and I am going to fight and fight and fight, and if the time ever comes that I haven't got that much gumption in the trial of any case, and particularly in this type of situation that I don't give a client everything I have got, then I am going to quit. Now then, as counsel has told you, when a man comes into a criminal case, it is presumed that he is innocent. When he sat down there, you had to say to yourself, [728] I accept the fact that he is presumed to be innocent and I am going to make the State prove the case to me. It is going to be their job to prove him guilty beyond a reasonable doubt. In some other countries when you get arrested, you have to prove your innocence, but in this Country, thank God, when you get arrested, they have got to prove it, and not just prove a part of it or a piece of it, but they have got to prove it to you and prove it to you beyond a reasonable doubt and that is what the law is. That is not my thoughts, that is the law, that His Honor, this distinguished Judge, and his wisdom has given

to you and you said you would live by that law. Now, there have been three pieces of evidence in this case. No. 1, let's consider it if you will. The testimony of Mr. Creighton, Mr. Creighton, who just prior to the time that he had come down here, that he was in the State Hospital. Now, I don't say that the fact that he was in the State Hospital, and believe me men, that you can't believe him, but I think there was something that was more significant about that, and that was when I asked him about how he went up there, he said oh, I put on a good act. He said I put on a good act, I fooled them. I fooled them and they sent me, sent him up there, sent me up there. I fooled them and the thought must have occurred to you men how he must have gone through that act, what a great act he must have put on for [729] them, and don't you think maybe he put on the same kind of an act for you? Now, you are the sole judges of his credibility. You are the ones who are going to say, would I convict anybody on his testimony, would I convict a dog on his testimony. My friends, when a witness testifies from the witness stand, you just don't listen to what he says, if that is all you had to do, all you would need would be ears, but you call upon all of your own experience in life. You apply it to the probabilities and you say let me see if it could have happened that way. Now let's look at the probabilities. No. 1, Mr. Creighton, were you promised anything, did they even discuss parole with you? Is there a man on this Jury, is there a man within the hearing of my voice that thinks that a convict who has gone through everything in God's green earth to try and get out of the Penitentiary, that he hasn't even discussed a parole? And he says now that he is living down in the County Jail. Do you think he will ever go back to the Penitentiary? Do you think he will ever go back among the people that he has testified against? Ask yourself, do you think that he will? Now,

you can't be just a little bit of a liar. You can't lie just a little bit, there is something indivisible about the truth. You can't be anymore little bit of a liar than you can be a little bit pregnant, and when somebody tells you a lie one time, then [730] you say by God, I don't know that I will ever believe them again, and let me ask you right now, did he not lie to you when he said there has been no, not even a discussion about a parole? Let's look at him a little bit further. Counsel said his testimony jibed and fit. No, no, his testimony doesn't fit at all. His testimony doesn't fit with Trout and his testimony doesn't fit with the alleged statement in this case. To begin with my friends, Creighton tells you that all during the time that they were down in Death Row, that the Defendant hollered at Creighton, that he hollered at Donnell, that I am going to kill you, and I am going to do this. Why don't you know in all of your good honest judgment that if he had done that my friends that when there was a guard on duty every minute of the time stationed down here, that they would have walked a guard in here, they would have walked ten of them in here. They are the ones that would have come in and said yes, he threatened him time after time. Not one comes in, not one, not a single soul comes in but Creighton. Now, do you believe that that happened my friends? Does that give you a reasonable doubt with respect to his credibility? Does that cause you to have some question about his credibility? Now in addition to that, if you believe Creighton's testimony, you must assume that this happened, that as those men came down and as they let them out of the cells one right [731] after the other, that the first thing that Stidham did was that he ran over to what is his name's cell, over to Creighton's cell, and that he went from Creighton's cell over to Donnell's cell, but that isn't borne out, is it, by Trout's testimony, because if you recall, Trout said that they came out and that the

knives were over in that corner, and that it was at least thirty minutes before they went back. Reasonable doubt my friends? Reasonable doubt? Now, on Creighton's testimony, on Creighton's testimony, did he offer anything when Creighton got through testifying, did he take away from this man a scintilla of his presumption of innocence? And let's look at something else, he said I was on the farm, and somebody else put some faith in what he said, somebody else put some faith in him, they put him on the farm some years ago and he walked off. He betrayed their trust and yet on his testimony, can you say I will convict him? No, no, I don't think you will. You will say no, I think you lied to me. I don't think anybody is going to say well, I am going to forget about this thing, I am not going to stand on the evidence, you can't say, you can't say out loud, My God I wash my hands of the blood of this man, and let's give him life and let's do that. You don't do that. You have got to be fair. You said I will make them prove the case to me, and I will make them prove it to each one of us. Now, let's look at the [732] next bit of testimony. The next bit of testimony is by Trout. Trout tells you, my friends, who incidentally tells you that there has never been a discussion of parole, Trout tells you that he is over in the County Jail, do you think he is ever going back to the penitentiary? Trout who also asked you to put some faith in his testimony, he walked off too. He left somebody with a red face. Now, let's look at him. Let's look at his testimony. Trout tells you that when he saw the thing, that he saw he was down in here. My friends, look at this. He said he was down in here hiding. He said he was in the dark. He said I was in the dark. Now, let me ask you in all sincerity, taking into consideration the lighting conditions, taking into consideration the way that that thing is set up, is there anybody here that can tell me in all sincerity and in all honesty that they believe that Trout

saw what he said he saw, and then on cross-examination, when you keep nagging at him, you find out that he left. You find out that he went downstairs. And there are little things, when I asked him about the water, and now I watched you, the water was important wasn't it? Why was it important? These are the little things that you have got to watch for in the trial of a case so that you don't make any mistakes, so that you don't convict an innocent man. If my friends, if he had turned off the water would there have been any water [733] here, in which they could have washed their hands? No, no, so when I read him back what he had testified to some month ago, it said the water and steam—he said no, I am talking about a boiler. That is a little thing, but on Trout's testimony, and they need Trout and Creighton my friends, but neither one of them said they saw who killed Donnell. Neither one of them said that they saw it. Now, let me ask you in all honesty and in all sincerity, based upon either or both of their testimony, if it were you or someone that you loved, would you convict him? Would you convict him? You know that you wouldn't. You know that you wouldn't, because when I leave here today you may never see me again. When Mr. Riley leaves, you may never see him, but my friends, your own heart and conscience is going to be with you forever, and if you make a mistake in this case, you can spend the rest of your life looking into the fire and worrying, did I make a mistake? I swore that I would be fair. I swore that I would make them prove the case to me and prove it beyond a reasonable doubt. You will say, did I come into this case with something in my heart which was not being fair? I don't think so. I am confident in you. I am confident that none of you did. Now, let's look, let's look at what they refer to as the third piece of evidence, 16 and 16-1. All right, the testimony my friends, in this case, clearly is that this [734] Young man had time and time

again denied that he had anything to do with that murder and then on the morning in question, now please when you sit down and when you stop to consider this, will you please consider this matter closely, will you do that? And while you say to yourself what in God's green earth, what in the world would have made a man change his mind, what in the world would have caused him to say after days, I had nothing to do with it, and then to say yes, I had something to do with it. Call on your own experience in life. Can they put that over on anyone of you? If there was not any other evidence in the case, could they put that over on you? If there was not a scintilla of evidence with respect to some type of beating, what do you think, do you think that he sat there and then all of a sudden the Holy Ghost calls down upon him, and he said, oh, I will tell you all about it, let me tell you, what do you think, do you think that is the way it was my friends? Do you think that is likely to happen with a man behind the bars that has nothing to lose, that he couldn't have sat there for hours and hours, unless they beat him and unless they tortured him in the way that they do behind iron curtains? I am going to tell you quite honestly and earnestly, don't ever let them pull that same thing on you or pull that same thing on me, because if they would, you would confess to anything, say for God's sake, let me down, I will say whatever you want me to say. Now, doesn't [735] that standing by itself, doesn't that standing by itself cause you to say that they must have done something? I know that they must have done something. Counsel talks about these police officers. Why he answered his own question. You don't think do you, that there is anybody in the wild world that thinks that a police officer is going to get up there and say, I beat a man, I beat him, take me to the penitentiary, take me to the Federal Penitentiary. You know they are not, and when counsel says there are some bad police officers, yes,

I am glad he admitted that, but I will tell you this my friends, that what he says, he may have seen some police officers, he can also tell you that he will never see one that will come in and let another one down either. They are not going to let each other down. They are in this thing together, and doesn't the thing smell a little bit? Don't you realize my friends that—what a rough job we have got? Stidham stands alone except for me. He stands alone. This thing happened inside behind the walls. This thing is behind the iron curtain, and now don't you see why just last week when there existed a record, a permanent record in our State, a permanent record, in which they said he died as a result of gunshot wounds, what in the world must have happened, what moving forces they have they can go in and change that record and come down here with this other record. They had to add the other thing to it. Doesn't that cause you to be suspicious? [736] Don't you say My God, I had better watch out, I had better watch out, I am liable to make a mistake here. Doesn't that cause you to say I am not satisfied beyond a reasonable doubt? Now, let's talk about the code, and this to me my friends, when he said it was a big thing, it is the biggest thing to me too, with respect to this statement. After we left Creighton's cell, I saw that Donnell's cell had been opened, and someone said, let's get Donnell, so we went in, besides myself in Donnell's cell, and I know that Paul Kenton, Laster, Thompson and Linder were there. That is it. Do you think my friends, that the man who says, I live by a code, that I don't snitch, and that I live by a code, by which I think that anyone who snitches ought to be killed, do you think, do you think that he would have snitched himself, unless they were about to tear the arms out of him? That is it, and I knew you caught it. I watched you. That is where they made their biggest mistake in this case, they tried to fatten it up too much, be-

cause they say, you heard them, here is a man who says, I will never snitch, if anybody snitches, kill him, and then for nothing, he should snitch. He should snitch on Linder. He should snitch on Thompson. No my friends, no, this man is telling you the truth before God, he tells you the truth. He tells you the truth when he tells you they tortured him. He tells you the truth when he says he had nothing to do with it. Now, what about this my friends, if he [737] does not tell you the truth, and if he wanted to make such an open and aboveboard statement, if he wanted to clean his heart for these distinguished officers, well what in the world caused him, when he got down to the State Hospital, what caused him then to tell them his story immediately? This isn't something that was concocted yesterday, this isn't something that is changed like the death certificate last week, this isn't something that we just dreamed up my friends, there is something that part of the official records of the Federal Government, and that which he went down there a couple of days later and he told them, he said I was hung up, he said look at my hand. He said I am paralyzed in my left hand and told you that he had never had anything, any difficulty with his hands. Does that give you some reasonable doubt my friends? Do you not in good conscience, do you not say in all sincerity and in all honesty, don't you say My God, they must have beat him, don't you say I know they beat him?

THE COURT: Come up here Mr. Ehlers. (Out of the hearing of the Jury) This is the third time in your argument that you have said "My God". In the opinion of this Court that is the use of profane language, and I want to call your attention to it, and I want counsel to refrain from such language in his argument.

MR. HENNELLY: Very well.

[738] MR. HENNELLY: You know, don't you know honestly my friends, don't you know that they had to do something to him? Now, and then there is something else in the case, isn't there? You know when we consider evidence, when you consider what is going to be necessary to convict a person, it isn't what a person says, all that I have to do is move my tongue a certain way to say a certain thing, and I may not be worthy of belief. So, what does the Jury want, a jury doesn't want talk, a Jury wants facts, and a Jury wants physical facts, in order to be satisfied. Now, let's look at the aspects of this case, which concerns itself with physical facts. You see my friends, a lie, you can always take a lie and put another lie to it, and the only time you change that is when you finally get down to the physical facts, because you can't change a physical fact, can you? Now, let's look at the physical evidence in this case. Lieutenant Barton tells you my friends that when he goes down into that cell, that night, that there was blood all over the place. He tells you there was blood on the floor and blood on the walls. There has not been a single witness who came into this Court Room, who told you that at anytime they saw James Stidham that night that he had any blood on him. Now get that. Don't you think that you could, do you think you could have gone in there and participated in that type of thing without getting some blood on you, and you heard the officer testify that there [739] is a method and a means whereby they can break down the blood. We may all have different types of blood. In fact, some of us may have the same type, but there are a number of ways you can break it down in four big sections. You can also break it down again. And if any of Donnell's blood was on this man, any of his blood, don't you think they would have brought that laboratory man in here and don't you think that when Lieutenant Barton tells you about today, this afternoon

he comes in and he said, I saw him out there, I saw him, don't you think that if there had been a bit of blood on him, don't you think that they would have had that in here my friends? And don't you think that if any of this man's fingerprints would have been anyplace around there, they would have brought that in here? These are things you can say, I don't have to guess about. This man says he was not in the cell, his fingerprints are in there. The man says that he did not cut the man, his blood type A, he has Blood O on his pants and he had blood on his shirt. You must have gotten it in there. That is not in this case. They prove his innocence, I didn't have to prove his innocence. The State proved his innocence to you. And doesn't that make sense to you also my friends, doesn't it make sense to you that to anyone who had been down in Death Row, that if they would have wanted to wash themselves, where would they have gone? Where would they have gone? They would have [740] gone in that shower. Do you think they would have gone here hidden in darkness where they could have washed themselves with a shower next to Stidham's cell, that he would have come down here? No. No, these are things in which you call on your own experience in life. These are things in which you say, I don't believe it, I am not satisfied beyond a reasonable doubt. I don't have to clean up the dirty linen of what happened in the Penitentiary. I don't need a state job. I am a citizen and I am here to do my duty, and life is getting pretty short for the youngest of us. It is getting so doggoned short, I am not going to my grave wondering whether I have convicted an innocent man. Now then, motive my friends, motive, say to yourself when I ask this question, tell yourselves who has got the biggest motive to kill Donnell, who has got the biggest motive to kill him, Linder, Thompson, Linder and Thompson had the biggest motive in this case to kill him, didn't they? Because the Defendant testified that this fellow Donnell

had been hollering at the—that the fellows from St. Louis was going to get him. He said, I didn't have anything to do with it. Now then, if this man's statement is right, that Linder and Thompson hit him with this, if that section of his testimony is right, are you going to believe part of it and disbelieve part of it? Then would they be the ones with a motive, wouldn't they be the ones that should be on trial and yet what do we know, [741] what do we hear in this case? We hear that tried in this case for the murder in which there is supposed to be a conspiracy, is the Defendant Rollie Laster, William R. Hoover, Kenton, Noble, DeLapp and Joseph Vidauri, no Thompson, no Linder. Now can you imagine that? Those are the men with the motive and if you believe his testimony here about Linder and Thompson, doesn't it make more sense to you here my friends, doesn't it make more sense to you that the way that that got in there was the way that everything else got in there, that a St. Louis Police Officer who made up his own mind as to who was responsible for the thing told him to do it, doesn't that make more sense to you my friends? Think of that, say to yourself, well if he says in his statement that Thompson and Linder were masked, what happened to the masked people, who are the people with the masks? And then the ones with the masks are the ones that get away. They are the people that get away. What is left, Stidham stands alone. Stidham stands alone hoping that in your heart and in your conscience, that down deep in your Christian decency my friends, in your Christian decency I say, and in all sincerity when this Court tells you in his instructions that you have got to be satisfied beyond a reasonable doubt, I feel confident there is bottomed in such an instruction the thought that there is someone greater than you and I; that there is someone and something that if a man makes a mistake [742] and if that is not proven beyond a reasonable doubt, there is someone to take care of that. There is someone

who can straighten that out. But you my friends, all you have to do is be fair, all you have got to do is be honest. Now then, with respect to the Doctor's testimony my friends, from down at the hospital, those records were read to you and the first record indicated that when he went in there, they applied the pinprick method and the doctor told you what that meant, and of your own knowledge, I know you know what that means. You know and perhaps have seen that same thing, where they determine your reflexes and that is a method which is sometimes used either with or in addition to the statement of one, and if you apply pinprick pressures to certain points and there is no reaction, then there is some damage, then there is some damage to the nerves in that hand. That record is in this case. That record was put in here. Now my friends, I have I think forty-five minutes to argue this case, and I am going to close now, and I am going to close with all the sincerity that I can, because I have done all that I can. I have done everything that I possibly could for this young man, and I don't think you are going to say that because he was in the Penitentiary that he is expendable. I don't think that you are going to say, well, let's not look at him in the same way that we would look at everybody else. I don't think you are going to say, well let's just convict him anyhow. I [743] don't think that you are going to say let's not even think about this, not consider this evidence, not be fair. I don't think there is a man in the world who would do such a thing. I think that down deep in the heart of every man he realizes that there just isn't any room in your heart for hate, anymore, and that for all of us who start out in life, maybe some of us might end up in this chair, maybe some of the others in this chair, but we can't say to him, we are going to abandon you, we can't say to him, we are going to forget about this thing, we are not going to give you a fair trial.

And I am wondering if I were to honestly submit this case to one greater than all of us, not only one of charity, not only one of love and one of honesty, but omnipotent, I am wondering if I would even have to ask, based on this evidence, for anything more than an honest verdict. I beg of you my friends, I beg of you to consider this case as you would consider it in the same method that you would someone that is near and dear to you, because today you are tall as a tree, each one of you, this is not a matter to be decided by some one person. If the President himself were to come down here and try to tell you what to do about this case, well you could laugh at him, because just as His Honor is the Judge, as to the law, you are a judge as to the facts. Twelve of you are judges as to the facts. You in your own mind and heart and conscience have sworn that you [744] would give him a fair trial, and if you do so my friends, there is only one verdict that you will bring in, and that is a verdict of acquittal, and for God willing and good conscience, you can do no other. Thank you.

MR. RILEY: If it please the Court.

THE COURT: Mr. Riley.

MR. RILEY: Mr. Hennelly and Gentlemen of the Jury. As you know by now, this is not my home. I am from Cole County. At the outset I want to thank the Court and all the officers of the Court, and especially you members of the Jury, for your time and attention to this case. Mr. Hennelly has said that Stidham stands alone in this case, and at the outset I want to tell you gentlemen of the Jury, that Stidham doesn't stand alone. If there is a witness anywhere within the State of Missouri that Stidham needed to prove his case or to back up a word that he said on that witness stand, all he had to do was ask that the Circuit Clerk issue that subpoena, and that witness would be here. He can have one or all, any bit that he wants. He don't stand alone. Where are those three men, Crabtree,

Lyons and Reed that he said he was up in B Hall with, where are they? Why didn't he have them down here? All he has got to do is ask for them. Was he afraid of what they would tell? The State of Missouri never knew until he said it from the witness stand who he was going to say that he was with that night in B Hall. They never [745] knew at all and had no way of knowing. He could have put those men on that witness stand. They would have testified that he was with them in B Hall, just like he told you from the witness stand, if he had been there. But did he put them on there? There isn't but one conclusion that you can draw Gentlemen, is that he knew if he put them on there that they wouldn't back up his story. That is the only conclusion that you can draw from that. Now Gentlemen, I realize why Mr. Hennelly is considerably exercised about this case. The old saying is, when the law is against you, try the facts, and when the facts are against you, then try the police officers, and that is exactly what he is going to do. He says that the police officers beat this confession out of him, beat this confession out of Stidham. Now, if you were going about the business of beating a confession out of a man, what would you say, would you let him write it out in his own handwriting and take a chance on his handwriting not comparing after you had beat him up, to what he ordinarily wrote before and after that time? No, you wouldn't take a chance on that, you would type it up on a typewriter and say here, sign it. It is a lot easier to write William Stidham than to write two pages out, and let him write it out in his own writing, own handwriting, and as far as that is concerned, as far as his injuries are concerned, there wasn't a single doctor that said he had any injuries. The [746] first doctor said he used the pinprick test, but that in his opinion, that injury was from an old scar. The second doctor said that the only way he knew there was any stiff-

ness in those fingers is from what Stidham told him; that he didn't use the pinprick test and that he didn't see any injury whatsoever on the man when he examined him. You remember the first part of the case, Mr. Hennelly made a considerable amount, and brought attention to the fact that in this it says he was twenty-five years old. I don't know how old he is, but in here he said he was twenty-five. Mr. Hennelly says that is the officer that says that. Stidham gets up on the witness stand and says that he didn't say he was twenty-five on September 27th, that he was actually twenty-eight. These witnesses said that Stidham, these witnesses that Stidham brought in here say that on the 29th day of September, that he told them he was thirty-four years old. And look at those fingerprints, that is the left hand that had to go out flat like that to take those fingerprints, and if you will look at that, there is more ink on the left fingerprints than there is on the right fingerprints. Anybody can see that. The left hand is more plain on it than the right. Maybe he is mistaken as to which hand was stiffened there on that day. Now another thing Mr. Stidham couldn't remember this picture being taken. Well, he only stood by that officer on one day, and that was September 29th, two days [747] after he had been beaten. That picture shows there isn't a thing the matter with his left hand there.

MR. HENNELLY: Object to his interpretation of the Exhibit, and ask that it be stricken and the Jury instructed to disregard it and a mistrial declared.

THE COURT: Gentlemen, you are the judges of the testimony, the Exhibit has been received in evidence, and you will give it such weight as you deem proper. The objection is overruled.

MR. RILEY: Now Gentlemen, you think of the things that Mr. Stidham left out in his testimony. Did Mr. Stidham ever deny that he made threats to kill Creighton

and Donnell prior to that night? Did he ever deny that? No, he said he didn't make any after six-thirty. He never said he didn't make any at anytime. Why wouldn't he say that he didn't make them at anytime? Why did he have to start at six-thirty with his denials? Mr. Hennelly says why would Creighton testify against him? Well now Mr. Stidham was down there to kill Creighton and Creighton's own testimony was that he was down there to kill him, and tried to kill him, and that they put him in the hospital with a broken jaw. Mr. Hennelly said what was the first thing that they did, did they go back to Donnell's cell, or would they run out of that area there, and he calls your attention to all these people who ran out. Go back over the testimony. These cells were all full here. Stidham [748] was back here in 23. Laster was in 21. And that when the riot was over, everybody was in their cells except Laster and Stidham. No one else was let out down there. The testimony shows that DeLapp and the rest of them got Stidham and Laster out, so that they could kill Creighton and Donnell. They didn't let anybody else out down in Death Row. Just Stidham and Laster, and according to his statement, Stidham and Laster are the ones that killed Donnell. They are the ones that slashed and cut him with the knife and the ice pick. And another thing, Trout says Stidham stopped here at the wash basin and took off his clothes and dropped his clothes in the water on the floor, took off his undershirt and washed himself, and Mr. Hennelly says why didn't they stop back here at 22 where the shower was and wash their hands in the shower. Now, why when you go in your bathroom, do you go in there and wash your hands in the shower, or do you wash them in a wash basin, now which do you do? Do you wash them in the wash basin? That is exactly what Stidham did. Why don't we have blood on Stidham's clothes? Because Stidham took his clothes off that night and left them there in the water.

MR. HENNELLY: Object to that Your Honor, outside of the record.

THE COURT: The objection is overruled.

MR. RILEY: Now Gentlemen, are you going to believe these police officers, two of them who are Highway Patrolmen right [749] here from your own area, who say that Stidham wasn't beat, do you think now, Mr. Hennelly says those police officers may do it, and those officers would stick by each other, but do you think Sergeant Little from over in your neighboring town of Cape Girardeau, and Caldwell from your neighboring town of Fredericktown, do you think they would have stayed in there with those other officers, if Stidham was beat like he says he was, and see them beat that man up and hang him up like they said he did? Would you do it? Even if you were one, you would say I will have none of that, and get on out, and if you want to beat him up, you beat him up, but it is none of my business, and I won't have none of it, and that is what you know these outstate Highway Patrolmen would do. If they didn't, if they wanted to beat him, they would have nothing to do with anybody else who would, and they would have got out of there, and they wouldn't be down here before you or their neighbors, and telling you under oath that they didn't beat him and that nobody else beat him. Now, that is what you can say. He can say what he wants to about the St. Louis Police Officers. You and I don't know much about them, but we do know about those Highway Patrolmen who are our friends and neighbors, and need—

MR. HENNELLY: Object to that, an attempt to inflame and prejudice the minds of the Jury, and ask that it be stricken and the Jury instructed to disregard it and a mistrial declared.

[750] THE COURT: The objection is overruled. You may proceed. The request is denied.

MR. HENNELLY: Very well.

MR. RILEY: Now Gentlemen, you have looked at these exhibits here, Stidham's handwriting is practically the same after he was beat up and hung up for fifty minutes, as it was when he sat calmly in his own cell two months later. Ordinary people, and you are ordinary people, can look at that and tell that. He signed his name exactly the same, there after he had been hung up for fifty minutes by his wrists, as he did when he sat calmly in his cell on December 7th, and again on February 23rd, when he was writing to the Honorable Sam Blair of Cole County, Circuit Judge of the Circuit Court, as he did when he says he was hung up and crippled. His handwriting and signature is exactly the same. Now Gentlemen of the Jury, I don't propose to take up all the time allotted me to talk to you about the discrepancies in Stidham's testimony, but remember Dietzel said he was up in B Hall in the cell with nobody that night. Did Stidham get back and take the stand and deny what Dietzel said? No. He was content to let it go.

MR. HENNELLY: Object to that, and ask that it be stricken and the Jury instructed to disregard it, and a mistrial declared, and that is in violation of the Constitutional Rights of the Defendant.

[751] THE COURT: The Defendant has taken the witness stand in this case and his failure to testify may be commented on about certain things. What he testified to can be commented on—

MR. HENNELLY: Not in rebuttal I don't think.

THE COURT: The objection is overruled.

MR. RILEY: His testimony was that there were fifteen police officers in that little classification room that talked to him at three o'clock in the morning. Well Gentlemen, put four more men and a big table in that Jury box, how crowded would it be? Is that reasonable that fif-

teen men would crowd in a little old place like that? What do you want fifteen for anyway? The police officers say they weren't there, but yes, he insists there were fifteen there besides himself and the chair and the table. Now, do you want to believe that, or do you think maybe Mr. Stidham is just pouring it on a little thick, trying to believe that why tell one lie, tell a big lie, you can make them believe a big lie, the bigger the better, than you can a little lie. Now Gentlemen, this case boils down even without the confession, the facts and circumstances, and evidence which the Court here says you are to consider, and which upon you can convict him alone, the circumstances show even without the confession, that Stidham and these six others, and don't you think for a minute that if Thompson and Linder were down there they wouldn't be charged too. But did you hear Thompson's name or [752] Linder's name mentioned by anybody? The guard said that he didn't see them down there. Creighton said he didn't see them. Trout said he didn't see them, and no one saw them down there but Stidham said they were there. The only reason in his testimony, he doesn't say that they were there, he doesn't say Thompson in his statement, doesn't say Thompson and Linder was there, he says I heard an exchange of words between two guys referring to each other as Thompson and Linder, but he doesn't say I saw Thompson and Linder there. He just said I heard their names mentioned. Maybe their names were mentioned, maybe they were mentioned by some of these six, I don't know. But he doesn't in his statement say that Thompson and Linder was there, and he doesn't snitch on Thompson and Linder either, as Mr. Hennelly would have you believe. He just said he heard their names mentioned. I don't know that they were there. There were two guys that were masked. He doesn't know who they were, and he doesn't say that it was Thompson and Linder.

Now Gentlemen of the Jury, the purpose of any criminal prosecution has two purposes. One to punish the guilty, and two, deter others from committing the same crime, and that is the purpose of this prosecution here. Now Gentlemen, shall Stidham be punished and shall others who are in similar circumstances be told by you and by your verdict here today, that the people, not only the people of Cole County or the people of any [753] other county, or only Butler County, but the State of Missouri will not stand for the convicts in the Missouri State Penitentiary to take the law in their own hands and kill and murder who they shall see fit without the benefit of trial by jury. Donnell didn't get it. Stidham is getting all of his rights, but he didn't give Donnell a trial by jury. He didn't give Donnell the right to subpoena a witness in his behalf. He didn't give Donnell a lawyer and a chance to come in Court and defend himself. No, he snuffed him out by the code that he lives by. And I say to you Gentlemen, by the code that he lives by and the code—is the code that he should die by, and you can put that in your verdict here today. Thank you.

THE COURT: Now Gentlemen of the Jury, there has been prepared for your convenience two forms of verdict which you may use in this case according as you may find the facts to be under the law and evidence in the case. Remember the instruction of the Court that all twelve of you must agree before a verdict can be reached. After all twelve of you have agreed, only the foreman of your jury needs to sign the verdict. You will retire to your Jury Room to consider this case, and the first thing that you should do is elect one of your number as the foreman of your jury. Then you will proceed with the deliberation in the case, in order to arrive at a verdict. Now, I think before—it probably will [754] be a lot cooler in the Library Room for the Jury to deliberate in there, than it would upstairs in the Jury Room. It is pretty hot up

there, but possibly some of you want to go to the rest room before you proceed with your deliberations in the case. Mr. Sheriff, I will ask first that you take the Jury up to the Jury quarters, and then when they are ready to retire and to consider of their verdict, you bring them down and back into the Library Room, and have one of your deputies check to see that the Library Room is cleared out and then you can put the Jury back there. If you arrive at a verdict, the Sheriff will be back by the door inside of the Court Room, just knock on the door when you have reached a verdict or when you either wish to convey some information to the Court, and then you can be brought back for those purposes, or for whatever purpose might arise at the time. So you will first go to your Jury Room, and then retire to consider of your verdict. The Jury may then retire to consider of your verdict.

The Jury then retired at 3:32 P.M. to consider of its verdict.

4:55 P.M.

THE COURT: The Sheriff has brought word to the Court that the Jury requested of the Court another form of verdict in the case and they stated to the Sheriff that they had "messed up" the forms that were furnished them by the Court. The record [755] may show that the Court furnishes them with a form, both for finding the Defendant guilty of murder in the first degree, and for finding the Defendant not guilty. The Court has prepared two forms of verdict which he has written in the right hand corner the Roman Numeral II, to indicate that this is the second form that was furnished to the Jury, which includes a verdict by which they might find the Defendant guilty of murder in the first degree, and leaving a blank space for the fixing of punishment, and a verdict, We, the Jury, find the Defendant not guilty.

MR. HENNELLY: I would want, when they do come back, to be able to examine the form that they have messed up, and at that time perhaps I might make some objection to it, and I, may the record show I am not objecting to the Court now calling them into the Court Room.

THE COURT: I would have to convey to them the information not to destroy the one that they have messed up.

MR. HENNELLY: That is all right.

THE COURT: I will just tell the Sheriff, when you take the forms No. 2 in to them, tell them not to destroy the other one, to bring the other one back with the instructions and the verdict that they return, and the one that they have mutilated or destroyed or messed up, as they said. All right.

The Jury then returned into Court at 5:07 P.M.

THE COURT: Just be seated Gentlemen. Gentlemen of the Jury, [756] have you arrived at a verdict?

MR. GAEBLER: We have.

THE COURT: Mr. Gaebler, are you the foreman of the jury?

MR. GAEBLER: Yes, sir.

THE COURT: Before I receive the verdict, I wish to make just a little record. You have brought back two sheets upon which there are forms of verdict, and the Sheriff brought me a message a moment ago, and said that you asked for additional forms of verdict, and the words that he used, was that the first form that had been provided was "messed up". I don't know what your exact message was.

MR. GAEBLER: That is right.

THE COURT: And I have here a form of verdict, two verdicts which are not signed, and on which there is some writing in ink, is this the form here, that I have in my hand, and you asked for another one?

MR. GAEBLER: Yes, sir.

THE COURT: Would you mark that with a Roman Numeral I, Mr. Ehlers, and initial it please?

The Reporter then marked a verdict form Roman Numeral I, LWE, 7/20/55.

THE COURT: I have then here in my hand two forms of verdict on one sheet of paper, which I have designated by Roman Numeral II, in the right hand corner, which was the form of verdict which the Court sent you after the message that he [757] received from the Sheriff. I wish to ask you now at this time Gentlemen, have you agreed upon a verdict?

MR. GAEBLER: We have.

THE COURT: We, the Jury, find the defendant, James William Stidham, guilty of murder in the first degree and assess his punishment at imprisonment in the State penitentiary during his natural life. Signed Herbert Gaebler, Foreman. Is that the verdict of all twelve of you gentlemen?

A. (General assent) Yes.

THE COURT: Is an individual poll of the Jury requested?

MR. HENNELLY: Yes, Your Honor. Excuse me, before that is done, may I request at this time that the panel be discharged and that a mistrial be declared. Let me see the first one. That is all. I just make that objection.

THE COURT: I might say for the record that the first form of verdict which the jury had, states: "We, the Jury, find the defendant, James William Stidham, guilty of murder in the first degree and assess his punishment at ..... and on the line for punishment, there is written on that line Life in Prison, L-i-f-e in P-r-i-s-o-n. And that is the form that they used first, and asked for another one, and then the one I have just read is the verdict that has been returned.

MR. HENNELLY: I just wanted to save the record on it.

THE COURT: Your objection is overruled, and the request is [758] denied.

THE COURT: Mr. Clark, you have heard the verdict which has been read by the Court, in which the Defendant was found guilty of murder in the first degree and his punishment assessed at imprisonment during his natural life. Is that your verdict sir?

MR. CLARK: Yes, sir.

THE COURT: Mr. Davidson, you have heard the verdict which the Court has just read, is that your verdict, sir, of guilty and punishment fixed at life?

MR. DAVIDSON: It is.

THE COURT: Mr. T. M. Walton, you have heard the verdict which the Court just read, guilty of murder in the first degree and punishment fixed at imprisonment in the State Penitentiary during his natural life, is that your verdict sir?

MR. WALTON: It is.

THE COURT: Mr. Barker, you have heard the verdict which the Court has read, is that your verdict sir?

MR. BARKER: Yes, sir.

THE COURT: Mr. Sparkman, you have heard the verdict which the Court has read, is that your verdict sir?

MR. SPARKMAN: Yes, sir.

THE COURT: Mr. Hinton, you have heard the verdict which has just been read, is that your verdict sir?

[759] MR. HINTON: Yes, sir.

THE COURT: Mr. Stilley, you have heard the verdict of the Court, that the Court has just read, is that your verdict sir?

MR. STILLEY: Yes, sir.

THE COURT: Mr. Crawford, you have heard the verdict, is that your verdict sir?

MR. CRAWFORD: Yes, sir.

THE COURT: Mr. James Sentell, you have heard the verdict which the Court read, is that your verdict?

MR. SENTELL: Yes, sir.

THE COURT: Mr. Lloyd Surber, you have heard the verdict read by the Court, is that your verdict?

MR. SURBER: Yes, sir.

THE COURT: Mr. Connie Fredwell, you have heard the verdict which the Court has just read, is that your verdict sir?

MR. FREDWELL: Yes, sir.

THE COURT: And Mr. Herbert Gaebler, Foreman of the Jury, is that your verdict sir?

MR. GAEBLER: Yes, sir.

THE COURT: Any further poll of the Jury?

MR. HENNELLY: No, Your Honor. I would like for the files to reflect that I would like to have thirty days additional time in which to file a Motion for New Trial.

THE COURT: I will show that the verdict is received and filed, [760] and we will go into that.

MR. HENNELLY: Very well Your Honor.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 429) Wednesday, July 20th, 1955, Regular July 1955 Term

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And after hearing the evidence, instructions of the Court and argument of the counsel in the case, the jury retires to consider its findings, and the Sheriff of Butler County is sworn in charge of the jury, and afterwards, on this same day, the said jury having agreed upon a verdict return into open Court and render to the Court a verdict which said Verdict is in the following words, to-wit:

VERDICT

We, the jury, find the defendant, James William Stidham, guilty of murder in the first degree and assess his punishment at *Imprisonment in State Penitentiary during his natural life.*

/s/ Herbert Gaebler,
Foreman

The above said verdict is signed by the Foreman, and returned and received by the Court. Now at this time, the Jury is polled as to their verdict and state the verdict as returned is their verdict. It is ordered by the Court that the Verdict herein be filed in this cause.

[761] Now comes the defendant, by counsel, leave of Court first had and obtained, and requests thirty (30) days in addition to ten (10) days, to file Motion for New Trial. And the Court after due consideration, does make the order that said request be and the same is hereby granted and the defendant is granted to August 29th, 1955, to file Motion for New Trial. It is ordered by the Court that this cause be passed for the filing of Motion for New Trial.

It is further ordered by the Court that the defendant herein, James William Stidham be remanded to the penitentiary, pending hearing on Motion for New Trial and further orders herein, and that he shall be returned for further orders in accordance with Court rulings.

And thereafter to-wit: On the 27th day of August, 1955, a Motion for New Trial was filed, which Motion for New Trial reads in words and figures as follows:

DEFENDANT'S MOTION FOR A NEW TRIAL

Comes now the defendant, James Stidham, and moves the Court to set aside the verdict and judgment heretofore entered in the aforesaid cause on the 20th day of July, 1955, and asks that a new trial be granted him in the aforesaid cause and for his reasons therefor states:

1. That the Court erred in accepting into evidence State's Exhibit No. 1, as it was hearsay, no proper foundation [762] was made for its introduction, it had not been properly identified and was accepted in evidence in violation of the constitutional rights of the defendant.

2. That the Court erred in accepting into evidence State's Exhibit No. 9, as it was hearsay, no proper foundation was made for its introduction, it had not been properly identified and was accepted into evidence in violation of the constitutional rights of the defendant.

3. That the Court erred in accepting as evidence, State's Exhibit No. 16, an alleged confession of the defendant, as under the evidence it was coerced and involuntary, was taken in violation of the constitutional rights of the defendant, and accepted into evidence before the State satisfied the necessary requirements of proof to introduce such a statement. The use of this alleged confession deprived the defendant of life and liberty without due process of law in violation of Article I, Section 10, of the Missouri Constitution, and in violation of the "due process" clause of the U. S. Constitution.

4. That the Court erred in accepting as evidence, State's Exhibit No. 16-A, an alleged confession of the defendant, as under the evidence it was coerced and involuntary, was taken in violation of the constitutional rights of the defendant, and accepted into evidence before

the State satisfied the necessary requirements of proof to introduce such a statement. [763] The use of this alleged confession deprived the defendant of life and liberty without due process of law in violation of Article I, Section 10, of the Missouri Constitution, and in violation of the "due process" clause of the U. S. Constitution.

5. That the court erred in not permitting the defendant to cross-examine witness Creighton completely with respect to his association and contact with one Mary Annis, and in refusing the offer of proof with respect to such testimony, as such offer would have shown the interest of the witness.

6. That the Court erred in not declaring a mistrial after State's witness Eitzman testified that "we took statements", even though the Court did sustain the defendant's objections and ordered the statement stricken, as such statement was hearsay, was not binding on the defendant, and in effect told the jury that the co-defendants had implicated the defendant, without giving the defendant the right to cross-examine said co-defendants. The Court could not cure this prejudicial hearsay because it was the type of poison which could not be erased from the jurors minds.

7. That the Court erred in not admitting into evidence and reading to the jury defendant's Exhibit B, as it was competent and relevant in touching both upon the witness Creighton's competency and credibility.

[764] 8. That the Court erred in not admitting into evidence and reading to the jury defendant's Exhibit C, as it was competent and relevant in touching both upon the witness Creighton's competency and credibility.

9. That the Court erred in not admitting into evidence and reading to the jury defendant's Exhibit C-1, as it was competent and relevant in touching both upon the witness Creighton's competency and credibility.

10. That the Court erred in not admitting into evidence and reading to the jury defendant's Exhibit D, as it was competent and relevant in touching both upon the witness Creighton's competency and credibility.

11. That the Court erred in not sustaining defendant's objection, Motion to Strike and Motion for a Mistrial, when Prosecuting Attorney Riley referred to the defendant's failure to take the stand in *rebuttal*, as such statement was in violation of the constitutional rights of no-comment. This statement was not a comment referring to defendant's failure to touch upon certain matters in his testimony in chief, but this rather directed the jury's attention to the failure of the defendant to *retake* the stand which falls within the scope of the no-comment rule.

12. The Court erred in failing to instruct the jury on murder in the second degree for the reason that said instruction was supported by the evidence and was required to be [765] given by the Court as part of the law of the case.

13. The Court erred in failing to instruct the jury on manslaughter for the reason that such an instruction was supported by the evidence and was required to be given by the Court as part of the law in the case.

14. The Court erred in giving and reading to the jury Instruction No. 4 for the following reasons:

(a) The instruction does not require the jury to find that the alleged conspirators wilfully, deliberately and premeditatedly, and of their malice aforethought killed

Donnell. It only requires that the alleged conspirators wilfully, deliberately, premeditatedly and with malice aforethought assaulted Donnell. It thereby fails to require the jury to find essential elements of the crime of murder in the first degree.

(b) The instructions by stating that Laster et al. entered into a conspiracy "to kill and murder", that defendant Stidham, at the time of such "killing and murdering" was a member of the conspiracy, that defendant had conspired with Laster et al. to aid, abet, assist or encourage them "in the killing and murdering", that defendant was present during the "killing and murdering", that he knew of the purpose of Laster et al. "to kill and murder", and that Laster knowingly aided, abetted, assisted or encouraged the alleged conspirators "in the aforesaid killing or murdering" by its continuous [766] use of the words "murder" or "murdering" constitutes a comment on the evidence by the Court, singles out and gives undue prominence to such words, and assumes that a murder had been committed.

(c) The instruction by requiring the jury to find that defendant had conspired with Laster et al. "to aid, abet, assist, or encourage them" and that defendant "aided, abetted, assisted or encouraged" Laster et al., erroneously used those terms disjunctively rather than conjunctively and allowed the jury to convict if they only found that defendant did one of those four acts, instead of requiring the jury to find that defendant did all four of those acts. Further, there was no evidence that defendant did all four of the acts and the jury was thereby allowed to convict defendant on a theory not supported by the evidence.

(d) The instruction by charging that Laster, Hoover, Kenton, Noble, DeLapp and Vidauri, entered into a conspiracy, and that defendant conspired with them, and that

the jury should convict if the defendant aided, abetted, assisted or encouraged "any of them" is erroneous because there was insufficient evidence that each of the aforesaid persons entered into a conspiracy. Defendant is thereby made responsible for the acts of persons who were not shown to be conspirators and the jury was allowed to convict the defendant upon a theory not supported by the evidence. The instruction [767] erroneously allows a conviction if the jury finds that the defendant did aid, or abet, or assist, or encourage one of the six named alleged conspirators even though the jury may further have found that one of the six named which the defendant allegedly aided, abetted, assisted or encouraged did not conspire to kill Donnell, nor did aid, assist, abet or encourage the other five named conspirators in the commission of the crime charged.

(e) The Court by requiring the jury to find that the defendant "theretofore had conspired and agreed" with Laster et al. to aid them in the killing of Donnell allowed the jury to convict the defendant on a theory unsupported by the evidence as there was no evidence of any conspiracy prior to the killing. This instruction coupled with the first paragraph of Instruction No. 5 which makes the defendant responsible for the acts of Laster et al. if he entered into a conspiracy allows a conviction of an alleged conspiracy not supported by the evidence as there was no evidence that defendant "theretofore" had conspired.

(f) The Court in requiring a finding that Laster et al. entered into a conspiracy "at the time and place and by the means" set forth in this instruction erroneously allowed a conviction if the jury found a conspiracy which was formed at the time of the killing for the reason that there was no evidence of any such conspiracy.

[768] (g) The instruction by authorizing a finding of guilty if the jury found that the defendant aided "any of them" being the persons named in the alleged conspiracy is erroneous because it is not supported by the evidence as there was no evidence to show that Jackie Lee Noble was a conspirator or to show that Jackie Lee Noble was a participant in the crime charged. The instruction authorized the jury to convict defendant if he conspired with Noble, or aided, abetted, assisted or encouraged Noble, a theory not supported by the evidence.

(h) The same objection set forth in subparagraph (g) above is applicable to a conspiracy and participation with alleged conspirator, William R. Hoover.

(i) The same objection set forth in subparagraph (g) above is applicable to a conspiracy and participation with alleged conspirator, Paul Edward Kenton.

(j) The same objection set forth in subparagraph (g) above is applicable to a conspiracy and participation with alleged conspirator, Rollie Laster.

(k) The same objection set forth in subparagraph (g) above is applicable to a conspiracy and participation with alleged conspirator, Don William DeLapp.

(l) The same objection set forth in subparagraph (g) above is applicable to a conspiracy and participation with alleged conspirator, Joseph M. Vidauri.

[769] (m) The instruction does not require that defendant Stidham wilfully, deliberately, premeditatedly, and with malice aforethought killed Donnell and thereby erroneously does not require the jury to find the essential elements of the offense of murder in the first degree.

(n) The instruction does not require the jury to find a conspiracy to wilfully, deliberately, premeditatedly and with malice aforethought kill Donnell and thereby errone-

ously allows the jury to find the defendant, Stidham, guilty even though he did not enter into a conspiracy to commit the offense of murder in the first degree and erroneously does not require the jury to find essential elements of the offense of murder in the first degree.

15. The Court erred in giving and reading to the jury Instruction No. 5 for the following reasons:

(a) The instruction, in its entirety, except for the first paragraph, is but an abstract statement of the law.

(b) The first paragraph of the instruction is erroneous because:

(1) There was no evidence of a conspiracy to kill Donnell "at the time and place and in the manner and by the means set forth in Instruction No. 4".

(2) There was insufficient evidence [770] that each of the mentioned persons entered into a conspiracy and thereby defendant is made responsible for the acts of persons not shown to be conspirators. The jury was thus allowed to convict the defendant on a theory not supported by the evidence. Defendant was also prejudiced by being made responsible for acts not connected with the alleged killing of Donnell even though the evidence was insufficient to prove a conspiracy, and to prove that each of the named persons were conspirators.

(c) The third paragraph of the instruction which states: "The Court instructs the jury that all persons are principals *who are guilty* of acting in concert and together in the commission of a crime" is erroneous in the following respects: It assumes that various persons acted in concert to commit a crime. It is a comment on the evidence because it says that all persons are principals "who are guilty".

(d) This instruction by using the following phrases: "in the commission of a crime", "when a crime is committed", "committing the crime", "actually committing the crime", "actually commit the crime", "commission of a crime", "commission of such crime", "for the commission of such crime", "the commission of such crime", "at the commission of such crime", "actually committing the crime", and "committing the [771] crime in the commission of the same" erroneously assumes that a crime was committed and constitutes an illegal, continuous and prejudicial comment on the evidence by the court.

(e) The instruction, especially in the first paragraph, tells the jury that the act of each conspirator in a conspiracy is the act of all and is erroneous because there was no evidence to authorize a finding of conspiracy to commit the crime charged before the commission thereof and there was no evidence to authorize a conviction of defendant unless he was present and participating in the crime charged. The jury in following this instruction and that part of the Instruction No. 4 which requires that defendant be actually present undoubtedly mislead the jury into concluding that if there was a conspiracy, the act of one conspirator was the act of all, and that the words "actually present" in Instruction No. 4 were satisfied by the presence of any of the other named conspirators.

(f) The Court by charging in the third paragraph that "When a crime is actually committed by one or more persons and another person is actually present, and knowing of the felonious purpose and intent of the person or persons committing the crime, *he knowingly and intentionally aids, abets, assists or encourages*" the person or persons committing the crime that such person is equally guilty with the person who commits the crime is erroneous because it assumes that mere [772] presence with

knowledge of the intent of the person or persons committing the crime is enough. It does not clearly require participation in the crime itself and thereby assumes a disputed fact and invades the province of the jury.

16. That the Court erred in giving and reading Instruction No. 16 in that the court states in paragraph 2:

"If the Jury does not believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury should entirely disregard such statement in arriving at your verdict", as the use of the term "claimed to be a confession made by the defendant" is ambiguous, indefinite and a comment on the evidence.

This paragraph of the instruction is further erroneous in that it uses the word "should", thus giving the jury an improper norm, and aggravates this misleading concept of the law by using the word "must" in paragraph 3 of Instruction No. 6, thus implying that the Court lays varying degrees of importance to different sections of the instructions.

17. That the Court erred in giving and reading Instruction No. 6 in that the Court states in paragraph No. 3:

> "If, however, the jury does believe that a statement, written or oral, and claimed to be a confession, made by the defendant, was voluntarily [773] made by him as defined above, the jury must consider such statement and *should* give it such weight as you believe it deserves in arriving at your verdict"

as the Court again refers to the expressions "and claimed to be a confession made by the defendant", which is ambiguous, misleading, incomplete (in that it does not state who makes the claim) and a comment on the evidence.

This instruction is further erroneous since it uses the mandatory word *must*, and gives judicial direction to the jury, invades their province and is a comment on the evidence. This erroneous use of the word "must" is aggravated by the use of the word "should" in paragraph 2 and the further use of the word "should" in paragraph 3. The various uses of the words "should" and "must" in paragraphs 2 and 3 in effect indicates to the jury that the Court lays different degrees of importance and stress on different sections of the evidence and the instructions.

18. That the Court erred in overruling defendant's Motion for a Polygraph Examination, and thereby the Court and jury was deprived of the use of scientific assistance and evidence of such examination, since the defendant represented to the Court that he intended to introduce the testimony of the examiner into evidence.

19. That the Court erred in not sustaining Defendant's [774] Motion for Judgment of Acquittal at the close of the State's case.

20. That the Court erred in not sustaining Defendant's Special Motion for a Judgment of Acquittal as to murder first degree at the close of the State's case.

21. That the Court erred in not sustaining Defendant's Motion for Judgment of Acquittal at the close of all of the evidence.

22. That the Court erred in not sustaining Defendant's Special Motion for a Judgment of Acquittal as to Murder First Degree at the close of all of the evidence.

WHEREFORE, the defendant prays the Court to grant him a new trial. Respectfully submitted.

Filed
Aug. 27, 1955
Clarence Pierce
Circuit Clerk.

And thereafter to-wit: On the same day, the following order was entered of record:

Miscellaneous Record, Circuit Court, Butler County, Missouri Saturday, August 27th, 1955, In Recess, (Book 10, page 477)

Now on this 27th day of August, 1955, comes the defendant herein, by counsel Mark Murray Hennelly, and files his Motion for New Trial in this cause.

[775] And thereafter to-wit: On the 13th day of September, 1954, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 488) Tuesday, September 13th, 1955, Regular July 1955 Term

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Now on this day, Motion for New Trial having been filed in this cause, cause is set for October 3rd, 1955, for disposition of the Motion and for such further orders in accordance therewith as necessary.

The Sheriff is ordered by the Court to produce the defendant, James William Stidham, from the State Penitentiary for appearance in Court.

And thereafter to-wit: On the 3rd day of October, 1955, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 510-511) Monday, October 3rd, 1955, Regular October 1955 Term

Now on this same date, comes James T. Riley, Prosecuting Attorney of Cole County, Missouri for the State and the defendant, James William Stidham, in person and in open Court and there also appears F. Neil Aschmeyer, Attorney at Law, St. Louis, Missouri, who states that he is an associate of Mark Hennelly, attorney for the defendant, previously appointed by the Court (Circuit) of Cole County, Missouri, [776] prior to the granting of the change of venue to this Court, and who represented the defendant in the trial of this case, and no objection being made by the defendant as to matters of representation, and the defendant being represented by F. Neil Aschmeyer, the Court now informs the defendant that he has been tried by a jury of Butler County, Missouri, and found guilty of the crime of Murder in the First Degree under an indictment against him and that his punishment was fixed at imprisonment in the State Penitentiary during his natural life, and being now asked by the Court if he has any legal cause to show why judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefore sentenced, ordered and adjudged by the Court that the said defendant James William Stidham having been found guilty as aforesaid, be confined in the Penitentiary of the State of Missouri for the period of his natural life, and that the Sheriff of this County shall without delay remove and safely convey the said defendant to the said Penitentiary there to be kept, confined and treated in the manner directed by law and the Warden of said Penitentiary is

required to receive and safely keep him, the said defendant, in the Penitentiary aforesaid until the judgment and sentence of the Court herein be complied with, or until the said defendant shall be otherwise discharged by due course of law.

It is further considered, ordered and adjudged by the [777] Court, that the State have and recover of said defendant the costs in this suit expended, and that hereof execution issue therefor.

And thereafter to-wit: On the 3rd day of October, 1955, a Motion to Appeal as a Poor Person was filed, which Motion reads in words and figures as follows:

MOTION TO APPEAL AS A POOR PERSON

Comes now the defendant, James W. Stidham, and respectfully represents and shows this Honorable Court that he is a pauper within the meaning of the law.

I.

Defendant further represents and shows that he has been convicted of Murder in the First Degree, and that he is aggrieved by said conviction, and desires to take an appeal, but that he has no money to pay costs for said appeal, nor to pay for bill of exceptions. That he has been advised by counsel that he has a good and meretricious cause to take appeal.

II.

Your defendant further represents and states that he will be denied the right to take an appeal unless this Honorable Court sustains this motion. He is without friends or relatives from whom he can get money to pay said expenses.

WHEREFORE, and because of the premises, this defendant [778] prays that his motion to sue as a poor person be sustained.

Filed
Oct. 3, 1955
Clarence Pierce
Circuit Clerk.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 511) Monday, October 3rd, 1955, Regular October 1955 Term

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Now on this same date, comes the defendant herein, in person and by counsel, and leave of Court first had and obtained, files his Motion to Appeal as a poor person. Said Motion is taken up and heard and considered by the Court, and this cause is passed at this time for further testimony or for orders herein.

And thereafter to-wit: On the same day, a Notice of Appeal was filed, which Notice of Appeal reads in words and figures as follows:

STATE OF MISSOURI)
) SS.
COUNTY OF BUTLER)

IN THE
CIRCUIT COURT WITHIN AND FOR SAID BUTLER COUNTY, STATE OF MISSOURI

[779] STATE OF MISSOURI,)
Plaintiff,)
vs.) No.
JAMES W. STIDHAM,)
Defendant.)

Charge: Murder First Degree

NOTICE OF APPEAL

NOTICE is hereby given that the defendant, James W. Stidham, hereby appeals to the Supreme Court of Missouri from the judgment of conviction of Murder First Degree entered against him in this Court in this cause on the 20th day of July, 1955; under said judgment defendant was sentenced to Life Imprisonment.

/s/ Mark M. Hennelly
Attorney for Defendant
Mark M. Hennelly
1832 Arcade Building
St. Louis 1, Missouri
CHestnut 1-2242

On this 3rd day of October, 1955, I duly filed the within notice in the records of this court and on this 3rd day of October, 1955, served a copy thereof upon the Prosecuting Attorney of Cole County, Missouri, and

Butler County, Missouri, and mailed additional copies as follows:

Clarence Pierce, Clerk
By: /s/ Eula Mae Adams

Filed
Oct. 3, 1955
Clarence Pierce
Circuit Clerk.

[780] And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 511) Monday, October 3rd, 1955, Regular October, 1955 Term

Now on this same date, comes the defendant herein, in person and by counsel, leave of Court first had and obtained, and files his Application and Notice of Appeal in this cause to the Supreme Court of Missouri.

And the Court having seen said Application and Notice of Appeal, and being now fully advised in the premises, does make the order that said Appeal be granted to the Supreme Court of Missouri.

It is ordered by the Court that the defendant herein be committed in accordance with the Sentence and Judgment of the Court.

And thereafter to-wit: On the 8th day of November, 1955, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 63, page 5) Tuesday, November 8th, 1955, Regular October 1955 Term

Now on this 8th day of November, 1955, Motion to Appeal as a Poor Person is filed in this cause and is taken up and submitted to the Court. And the Court having seen said [781] Motion, and being now fully advised in the premises, does make the order that said Motion to Appeal as Poor Person be and the same is hereby sustained.

And thereafter to-wit: On the 3rd day of January, 1956, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 63, page 50) Tuesday, January 3rd, 1956, Regular January 1956 Term

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Now on this day the defendant herein is granted by the Court an additional ninety days to file transcript on appeal in this cause.

[782] STATE OF MISSOURI)
) SS
COUNTY OF BUTLER)

I Leonard W. Ehlers, hereby certify that I was the reporter in the Circuit Court of Butler County, Missouri, 33rd Judicial Circuit, Poplar Bluff, Missouri, in which the foregoing case was tried; that I prepared the foregoing transcript of the record under an order of the court permitting the defendant to perfect his appeal as a poor person and that there is due and owing me the sum of $469.80 for an original and 1 copy, the cost of the original at 45¢ per page being $352.35, and 1 copy at 15¢ per page being $117.45, or a total of $469.80.

/s/ Leonard W. Ehlers
Leonard W. Ehlers,
Official Court Reporter,
33rd Judicial Circuit,
Poplar Bluff, Mo.

STATE OF MISSOURI)
) SS
COUNTY OF BUTLER)

I, Clarence Pierce, Clerk of the Circuit Court, Butler County, Missouri, do hereby certify the annexed to be the typewritten transcript of the record filed on the 25th day of May, 1956, in Cause No. 3158 of the causes of this court, wherein the State of Missouri is Plaintiff [783] James William Stidham is the defendant, as fully as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Poplar Bluff, Missouri, this 25th day of May, 1956.

/s/ Clarence Pierce
Clerk, Circuit Court
By: /s/ Eula Mae Adams
Deputy Clerk

Approved:
/s/ Mark M. Hennelly
Attorney for Appellant
/s/ James T. Riley
Attorney for Respondent

APPENDIX B—Transcript in: State v. Stidham,

No. 52406

[1] IN THE
CIRCUIT COURT WITHIN AND FOR THE COUNTY OF BUTLER, STATE OF MISSOURI

STATE OF MISSOURI	)	
Plaintiff,	)	
vs.	)	No. 3158
JAMES WILLIAM STIDHAM,	)	
Defendant.	)	

SUPPLEMENTAL TRANSCRIPT

(Filed September 21, 1966)

And thereafter to-wit: On the 7th day of June, 1966, Defendant herein, by counsel Pro-Se, files Motion to Vacate Judgment and Sentence, which Motion to Vacate Judgment and Sentence, reads in words and figures as follows:

Motion to Vacate Judgment and Sentence

Pursuant to the provisions contained in Missouri Supreme Court Rule 27.26, Movant respectfully moves the Honorable Court to vacate and hold for naught the judgment and sentence herein, and as reasons therefor, states:

FACTS INVOLVED

On September 22, 1954, movant was an inmate of the Missouri State Penitentiary serving a sentence of twenty-five years for armed robbery. On the above date he was detained in a section of the prison referred to as Death Row; among others, Rollie Laster, James M. Creighton, and Walter Lee Donnell were also detained on Death Row

for various reasons; [2] and at approxiamtely six P.M. on the above date, a full scale riot occurred in said prison; Death Row was broken into, movant and Laster was released therefrom, and during the riot Donnell was allegedly murdered.

The riot supra, was quelled on September 23, 1954, at seven AM, and on said date, William DeLapp, William R. Hoover and Jackie Lee Noble signed statements for members of Missouri Highway Patrol and St. Louis Policemen admitting complicity in the aforesaid murder, and therein accused movant as the principal to the murder. On the above date movant was questioned by the aforesaid officers about the murder supra, thereupon he denied any complicity or knowledge of said murder.

On September 24, 1954, movant was questioned several times by various officers relative to said murder, and at each interrogation he denied any knowledge or complicity of said murder. On the above date, movant wrote a letter addressed to his parents asking them to immediately visit him with an attorney, enough postage was placed on said letter to register it, but the letter was not allowed to leave the prison.

From September 23, 1954, till September 27, 1954, movant was held incommunicado, was questioned at least twenty-six times by relays of Missouri Highway Patrolmen and St. Louis Policemen, and at each interrogation, movant denied any [3] knowledge of the aforesaid murder. The first time movant was interrogated, he was in good health, and weighed 184 pounds.

On the morning of September 27, 1954, Paul Edward Kenton, and Rollie Laster signed confessions to the murder supra, and therein named movant as a participant to the aforesaid murder.

Subsequently, and momentarily thereafter, a St. Louis Policeman, and a Missouri Highway Patrolman came to movant's cell on Death Row, handcuffed his hands to his back, placed him in a patrol car, and drove him a quarter of a mile to a lonely and isolated spot known as the "field house". Whereat other Missouri Highway Patrolmen and St. Louis Policemen were holding an accusatory session. Immediately upon arrival at said field house, movant was specifically accused of the murder supra, by the aforesaid officers. The aforesaid officers wore sidearms, were armed with riot guns, and despite it being such a hot day that the aforesaid officers had been directed to remove their coats and work in their blouses, Movant's arms remained handcuffed behind him until he agreed to write a statement admitting complicity in the aforesaid murder. After being accused for approximately thirty minutes, Movant agreed to write a statement, whereupon the handcuffs were removed; *he was not advised of his Constitutional Rights to remain silent, or his Constitutional Rights to Counsel, or that any statement he made might be used against him.* [4] Sergeant Percy Little of the Missouri Highway Patrol dictated portions, if not all of the contents of the aforesaid statement or confession. The confession gave movant's name incorrect, gave his residence incorrect, his past record incorrect, misspelled the name of Creighton, and did not dovetail with any material evidence that was later introduced at movant's trial. (Movant later introduced evidence and testimony to the effect that he was tortured by the aforementioned officers into making a confession, but since this was contradicted by the State, Movant herein relies exclusively upon undisputed testimony and evidence to secure relief.)

After the aforesaid confession was obtained, Movant was lodged in O-Hall until September 29, 1954. He was not

given food or water, he was not accessible to friends, relatives, or attorney, and a Catholic Priest was specifically denied permission to visit Movant because he was too badly beaten and bruised according to the opinion of Missouri Highway Patrolmen.

On the morning of September 29, 1954, Movant was escorted to the Cole County Magistrate Court for arraignment on the information charging first degree murder in the death of Walter Lee Donnell. Movant had already been threatened by the aforesaid officers that he had better waive preliminary hearing at said arraignment. Then, immediately before [5] arraignment Movant requested to phone an attorney but was refused this right by Foster R. Wheatley, Cole County Magistrate Judge, thereupon Movant shouted out and asked if an attorney was present in the Court room, James T. Riley, Cole County Prosecutor, commanded Movant to remain silent— Consequently, Movant was not allowed to contact counsel.

Immediately thereafter, Movant was transported to Springfield, Missouri, and lodged in the U. S. Medical Center. Upon entry there, Movant was examined by Doctors, said examination revealed that Movant weighed 159 pounds, his left hand and arm was paralyzed, and his body was a mass of bruises, which Movant stated was the result of torture inflicted upon him by Missouri Highway Patrolmen and St. Louis Policemen. Movant was held incommunicado for several days at Springfield.

In due course, Movant was arraigned in the Cole County Circuit Court at Jefferson City, Missouri.

Movant's attorney, Mark M. Hennelly, filed a written motion to Suppress the aforesaid confession for the reason that it was not voluntary, was the product of coercion, torture, was made in violation of his constitutional rights,

and he was denied counsel at the time said confession was made. The Motion to Suppress was denied.

Subsequently, Movant secured a change of venue and his trial site was moved to Poplar Bluff, Missouri.

During said trial, Herman Trout and James M. Creighton, [6] both convicts of the Missouri State Penitentiary, and principal State witnesses, testified that representatives of the State had not offered them any consideration or inducements for their testimony, whereas, both of them had been promised, and subsequently received their freedom in exchange for their testimony. Both of these witnesses gave perjured testimony that will be more fully developed hereinafter.

The admissibility of the confession supra, was objected to out of the hearing of the jury, as well as in the presence of the jury. Said objection was predicated upon the U. S. and Missouri Constitutions. Said objection was overruled, and in the absence of a finding, or ruling by the trial Judge that said confession was voluntary, the confession was admitted into evidence, and the jury was instructed to determine the voluntariness of said confession. Thereafter, without movant being present, and in the absence of his counsel, the jury retired for deliberation, and subsequently returned a guilty verdict with a life sentence recommendation.

Movant's Contention

It is the contention of your movant and he alleges that the within conviction and sentence is contrary to the fifth, sixth, and fourteenth amendments to the United States Constitution, and violates the commands embodied in the Missouri Constitution, in that:

[7] (1) The confession supra, was the exclusive product of coercion used and practiced upon Movant by members of the Missouri Highway Patrol, and St. Louis City Policemen, in that:

A. Movant was held incommunicado prior to making the confession, and,

B. Movant was expressly denied the assistance of counsel prior to giving the aforesaid confession, and,

C. At the time of the confession supra, was made, the *accusatory stage had been reached,* and it was incumbent that Movant be afforded his Constitutional rights to counsel, and,

D. Movant was protractedly, and intensely interrogated twenty-six times by relays of officers during the five day period before a confession was obtained, and,

E. Movant was taken to a distant, lonely, and isolated place where the confession was obtained, and,

F. Movant's hands were handcuffed behind his back, and numerous officers armed with sidearms and riot guns had movant encircled until the moment a confession was made, in the gruelling atmosphere of the hot day, and,

G. After the confession supra, the treatment inflicted upon Movant, as hereinabove outlined, and hereinafter elucidated, invalidates said confession, and,

H. The trial judge committed Constitutional error by failing to make a specific finding that said confession was [8] voluntary, but submitted said question to the jury for determination. See instruction No. 6, and,

I. The *undisputed* portion of the trial evidence reflects that the confession supra, was the result of coercion, and was not the product of a free choice, and,

(2) Movant was denied the right to obtain counsel at a critical stage of the proceedings, and,

(3) The State of Missouri knowingly used perjured testimony to obtain the within conviction, and,

(4) The State of Missouri deliberately withheld and suppressed evidence that would have been favorable to Movant at his trial, and,

(5) Movant was not present, nor was his counsel, during the deliberation of the jury, and,

(6) Movant was deprived of his liberty in violation of "due process of law" for other reasons that will appear more fully hereinafter.

The Law And The Argument

Missouri Supreme Court Rule 29.01 (a) provides:

> "In every criminal prosecution in *any court* of this State, the accused shall have the right to appear and defend the same in person and by *counsel.*"

Compare Section 18, Article 1, Missouri Constitution. Rule 21.14 of the Missouri Supreme Court, provides among other things, that:

> [9] "All persons arrested and held in custody by any peace officer, without warrant, for the alleged commission of a criminal offense, or on suspicion thereof, shall be discharged from such custody within twenty hours from the time of arrest, unless they be held upon a warrant issued subsequent to such arrest. While so held in custody, every such person shall be permitted to *consult with counsel* or *other persons in his behalf.*" * * * Compare Section 544.120 R.S. 1949

Missouri Supreme Court Rule 29.05, provides:

> "Every person arrested and held in custody by any peace officer in any jail, police station or other place, upon or without a warrant or other process for the alleged commission of a criminal offense, or upon suspicion thereof, shall be permitted to consult with counsel or other persons in his behalf, and, for such purpose, to use a telephone, if one be available." Compare Section 544.170 R.S.Mo. 1949

The fifth amendment to the United States Constitution, among other things, provides:

> "* * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *"

[10] Amendment sixth to the United States Constitution, states among other things, that:

> "* * * and to have the assistance of counsel for his defense * * *"

The Fourteenth Amendment to the United States Constitution provides:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws * * *"

The uncontradicted evidence, namely, the trial transcript, will undisputedly reflect that Movant was the victim of at least twenty-six protracted and persistent interrogations conducted in relays by members of the Missouri State Highway Patrol and St. Louis City Policemen; he had been held incommunicado for five days and denied the right to consult or contact counsel and relatives before a confession was obtained.

See Rech v. Pate, 81 S. Ct. 1541, and cases cited therein, where the United States Supreme Court condemned and held it contrary to the Constitution for a confession to be obtained and used under the circumstances as hereinabove outlined.

See also:

[11] Columbe v. Connecticut, 81 S. Ct. 1863
Lee v. State of Miss. 68 S. Ct. 300
Haley v. Ohio, 68 S. Ct. 302
Lyons v. Oklahoma, 64 S. Ct. 1208

In Ward v. State of Texas, 62 S. Ct. 1139, the United States Supreme Court stated:

> "This court has set aside convictions upon confessions extorted from ignorant persons who have been subjected to *persistent and protracted* questioning, or who have been held *incommunicado without advice of counsel or friends,* or who have been taken into lonely and isolated places for questioning. *Any one of these grounds would be sufficient cause FOR REVERSAL.*"

The circumstances surrounding Movant's confession, and the facts set forth in Ward v. Texas supra, are almost identical in every respect, with the exception that Movant was an inmate of the penitentiary, he was escorted to a lonely spot, and place of isolation in the prison, his hands and arms were handcuffed behind him, he was surrounded by officers armed with pistols and riot guns, and the weather was so hot that the officers had been instructed to remove their jackets, and proceed in their blouses.

Where the undisputed evidence shows that a citizen has denied complicity in a crime at least twenty-six times, [12] has been held incommunicado several days, and while in good health, is taken to a lonely isolated place behind

prison walls where a confession is obtained, and thereafter, on the same day, it is the officers' opinion that Movant's body is too badly beaten for a priest to visit him, his hands and arm becomes paralyzed, and his body weight decreases, don't these undisputed facts make the conclusion, irresistible that said confession was not the product of a free choice, but was the fruits of numerous types of coercion superimposed upon Movant by members of the Missouri State Highway Patrol, and St. Louis City Policemen.

This Honorable Court is invited to examine the decision of the United States Supreme Court in Lisenba v. California, 62 S. Ct. 280, wherein that Honorable Court said:

> "We have not hesitated to set aside convictions based in whole upon confessions extorted in graver circumstances. These were secured by *protracted* and *repeated* questioning of ignorant and untutored persons in whose minds the power of officers was greatly magnified, who sensed the adverse sentiment of the community and the danger of mob violence, who have been held *incommunicado, without the advice of friends or counsel*; some who have been taken by officers at night from the prison into *dark and lonely places* for questioning. And Due Process of [13] Law, preserving for by our Constitution Commands that no such practice as that disclosed by this record shall send any accused to his death." (Italics supplied.)

At Page 602 of the trial Court's transcript, the following colloquy transpired:

> (Redirect examination of Defendant)
> Q. Did they continue to question you while you were in that position?

A. Yes, sir, they did. They didn't question me, *they accused me.*

Prior to the hour Movant's confession was obtained, his five co-defendants had signed statements which indicated that Movant was a principal participant in the murder supra. The first of these statements were made by William DeLapp on September 23, 1954, then William R. Hoover, then Jackie Lee Noble, then Paul Edward Kenton, and then Rollie Laster. Consequently, and in view of Movant's denial of any complicity in the murder during the previous twenty-six interrogations, and by reason of the above co-defendant's statements, the aforesaid officers became convinced in their opinion that Movant was guilty, and at the final session held at the field house supra, where Movant's confession was obtained, he was not questioned, but was specifically accused of the aforesaid murder, as the above undisputed testimony reflects.

Therefore, it is the contention of your Movant and he respectfully alleges that on September 27, 1954, at the session in the field house at the Missouri State Penitentiary, the *accusatory* stage then and there began, and he was actually tried and convicted the moment the confession was obtained, and was thereby deprived of his liberty without Due Process of Law for the reason he was not afforded his Constitutional Rights to Counsel; but had theretofore been denied and deprived of the assistance of Counsel.

When the accusatory stage supra, had been reached, it was Constitutionally prerequisite that Movant be allowed the aid and advice of Counsel, and when he was deprived of this sacred right, the confession supra, became coercive in nature, and any conviction predicated thereon is void ab initio, violates "Due Process of Law", and entitles Movant to his release from prison.

A full and complete answer was recently given to the above situation by the United States Supreme Court in the widely publicized case of Escobedo v. Illinois, 378 U. S. 478. In that landmark decision, the Court examined the concept of a "Criminal Prosecution" within the meaning of the Sixth and Fourteenth Amendments and explored its initial boundaries. The Court rejected the sterile notion that a criminal prosecution, with the attendant right to Counsel, does not begin until the initation of formal judicial proceedings. Rather, [15] reaffirming its functional approach to the interpretation of the Sixth Amendment, the Court determined that a criminal prosecution begins when a person stands accused of a crime by the *forces of the State.* That point is reached, the Court said, ". . . when the process shifts from the investigatory to accusatory - - - when its focus is on the accused and its purpose is to elicit a confession. . ." 378 U. S. at 492, at that point, the adversary system begins to operate against the accused, and his right to counsel comes into play.

In *People* v. *Dorado,* 62 Cal. 20, 338, 354, 398 P. 20361, 371, the California Supreme Court recently interpreted Escobedo correctly, when it said:

> "Only when the investigatory stage has become an *accusatory* one, that is, when it has begun to focus on a *particular suspect,* the suspect has been taken into police custody, and the police have carried out a process of interrogations that lends itself to eliciting incriminating statements, does the doctrine of Escobedo apply and the confession given without the required warning or other clear evidence of waiver become inadmissible evidence."
> (Italics supplied.)

The result in Escobedo followed inexorably from a series of cases in which the United States Supreme Court

took a functional rather than a formalistic approach to the [16] "right-to-counsel" issue, beginning with *Powell* v. *Alabama*, 287 U. S. 45, and continuing to *Massiah* v. *United States*, 377 U. S. 201. In *Powell*, the Court held that an accused in a capital case "requires the guiding hand of counsel at every step in the proceedings against Him", including a stage sufficiently before trial to give the lawyer time for adequate preparation of the defense. At 287 U. S. 59, 69. In Hamilton v. Alabama, 368 U. S. 52, 54, the court held that "every step in the proceedings" against the accused included arraignment, for that was "a critical stage in a criminal proceeding. What happens there may affect the whole trial."

White v. *Maryland*, 373 U. S. 59, and Massiah v. United States, 377 U. S. 201, directly compelled the result in *Escobedo*—unless Constitutional rights were made to hinge on distinctions devoid of substance. In *White*, the court held that a guilty plea entered at a preliminary hearing in the absence of counsel was inadmissible at trial, and surely no significant distinction can be drawn between an uncounseled confession given to a judge in open court and one given to the Police in a secret penitentiary field house interrogation. In *Massiah*, the court assured the right to counsel during police interrogation after indictment, thereby erasing the line between judicial and extrajudicial proceedings in determining the stages at which an accused is entitled to legal aid and advice. The court there (377 U. S. at 204) relied [17] upon the sound reasoning of Mr. Justice Stewart's concurring opinion in Spano v. New York, 360 U. S. 315, 327:

> "Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly Courtroom, presided over by a judge, open to the public, and protected by all procedural safeguards of the law. Surely

a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station."

After Massiah, the only remaining question was whether a line drawn between police interrogations before and after indictment was rational. Such a line had already been criticized by the Chief Justice of California as "formalistic". *People* v. *Garner*, 57 Cal. 2d 135, 160, 367 P. 2d 680, 695 (Fraynar F., Concurring). And Mr. Justice Douglas joined by the Chief Justice, Mr. Justice Black and Mr. Justice Brennan, had argued such a distinction because "what takes place in the secret confines of the police station may be more critical than what takes place at the trial." *Crocker* v. *California*, 357 U. S. 433, 444-445.

In *Escobedo*, the question was laid to rest; the Court rejected a distinction between interrogation of an accused before and after formal indictment as not "meaningful". 378 U.S. 486.

[18] Not only is Escobedo firmly grounded in precedent, it is also firmly grounded in the underlying principle that "ours is the accusatorial as opposed to the inquisitorial system" of justice. *Watts* v. *Indiana*, 338 U. S. 49, 54. The doctrine of *Escobedo* is necessary to prevent law enforcement officers from circumventing the safeguards of the accusatorial, adversary trial. The facts of the present case demonstrate that necessity. Indeed the evils of the inquisitorial system come to mind as we visualize Movant's secret detention for five days of questioning and recall Mr. Justice Frankfurter's reference in *Watts* v. *Indiana* to "the practices borrowed by the Star chamber from the continent whereby an accused was interrogated in secret for hours on end." Ibid.

Movant's plight from September 23, 1954, to September 29, 1954, demonstrates why the right to counsel would

indeed be "a very hollow thing" (In re Graban, 352 U. S. 330, 344, (Black, J., dissenting) if it were not afforded until after the police chose to take a suspect before a Magistrate to be formally charged. For Movant, just as Danny Escobedo, the right to a lawyer at the pleading or trial stage was a right of little worth; he had already lost his case in a secret pre-trial proceeding in a lonely isolated Field House at the Missouri State Penitentiary. The State emerged the clear winner of this contest after six days. Movant armed with a meagre education, deprived of the right to contact his family [19] and/or attorney, surrounded by officers armed with pistols and riot guns, his arms cuffed behind him on a "hot day" until he agreed to write a confession and incriminate himself, hardly provided the challenge that is "the essence of our adversary system".

Without the "guiding hand of counsel", Movant was no match for the adversary power represented by the officers assembled in the Field House at the Missouri State Penitentiary on September 27, 1954, a power doubtless exaggerated by Movant's prolonged incommunicado detention, and his futile denials during twenty-six prior interrogations. Movant faced his accusers and interrogators *alone*. There was no one to advise him how to remedy the flagrantly illegal conduct of the police in holding him incommunicado; there was no one to advise him that the police had no legal power to compel him to talk; there was no one to advise him of the consequences of the answers he might give. There was no one, for example, to tell him that the confessions made by his co-defendants were not binding upon him, nor could they be used against him in a court of law.

The proceedings against Movant had reached "*The accusatory stage*" by the time his confession was elicited.

This is apparent from the above undisputed testimony, and the fact that the police had obtained confessions from five co-defendants implicating Movant.

[20] In Escobedo, three circumstances were cited to show that the accusatory stage had been reached: (1) "The investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect;" (2) "The suspect has been taken into police custody;" (3) and, "The police carry out a process of interrogations that lends itself to eliciting incriminating statements". 378 U. S. at 490-491. Movant's position at the time of his confession is indistinguishable from Escobedo's. Here, as in Escobedo, the State clearly proceeded to the "accusatory stage" and Movant was Constitutionally entitled to the assistance of counsel.

By the time Movant was taken to the Field House at the Missouri State Penitentiary, he had, for all practical reasons and purposes, been charged with murder of Walter Lee Donnell. Compare Escobedo v. Illinois, 378 U. S. 478, 486. He was told by the officers his five co-defendants had already signed confessions implicating him. Danny Escobedo was in custody perhaps five hours before his confession was elicited; Movant had been held incommunicado for five days, and had denied all complicity in the murder during twenty-six prior interrogations protractedly and persistently conducted by relays of officers.

As in Escobedo, the officers were obviously out to "get" Movant to confess his guilt. There is no indication in [21] the trial court transcript of trial that he was not required to answer their accusations, they led him to believe they had the "goods" on him and confronted him with the confessions of his co-defendants. This was not general questioning intended to give Movant an opportunity to ex-

plain suspicions of the circumstances. See Gallegas v. Nebraska, 342 U. S. 55, 71.

Many Courts have rendered decisions predicated upon Escobedo, and this Honorable Court is respectfully invited to examine the following cases regarding the same:

United States ex rel. Russo v. New Jersey, (C.A. 3) 351 F. 2d 429, 437
Collins v. Beto, 348 F. 2d 823, 830 (C.A. 5)
Wright v. Dickson, 336 F. 2d 878, 882 (C.A. 9)
U. S. ex rel. Netters v. Rundle, 246 F. Supp. 540, 542
U. S. ex rel. Kemp v. Pate, 240 F. Supp. 696, 707
Galarza Cruz v. Delgado, 233 F. Supp. 944, 948
People v. Dorado, 62 Cal. 2d 338, 398 P. 2d 361
State v. Hall, 88 Id. 117, 129-31, 397 P. 2d 261
State v. Neely, 239 Ore. 487, 500-63, 398 P. 2d 482
State v. Dufour, 206 A. 2d 82, 85 (R.I.)

After a hearing outside the presence of the jury on the question of whether the confession supra, was voluntary, the trial judge failed to rule specifically on the voluntariness of said confession, but made it a jury question, and delivered the following instruction. (No. A6)

[22] "The Court instructs the jury that before any alleged statement can be valid, and before you can even consider it, it must have been made voluntarily, that is to say, without anyone having offered to the person who is claimed to have made such statement any hope of leniency or reward of any kind for making such statement, and without anyone making any threat or doing any violence to the person claimed to have made any such statement in order to induce or coerce him to confess.

If the jury does not believe that a statement, written or oral, and claimed to be a confession made by the

defendant, was voluntarily made by him as defined above, the jury should entirely disregard such statement in arriving at your verdict.

If however, the jury don't believe that a statement, written or oral, and claimed to be a confession made by him as defined above, the jury must consider such statement and you should give it such weight as you believe it deserves in arriving at your verdict."

A full and complete objection was made to the above instruction, and overruled by the trial court.

In Jackson v. Denno, 378 U. S. 368, the United States Supreme Court condemned the above procedure and instructions, and pointedly stated that the above practice used in *Missouri* [23] *Courts* is contrary to the Constitution, and violates due process of law.

At the trial of Movant, his counsel repeatedly objected to the introduction of the aforesaid confession. Said objections were predicated upon the provisions contained in the United States Constitution, and Constitution of Missouri.

When Movant appeared before the Cole County Magistrate Court on September 29, 1954, he immediately requested, and was refused the right to phone an attorney. Thereupon, he shouted out in the Court room and inquired if an attorney was present. James T. Riley, prosecutor, and Foster S. Wheatley, Magistrate Judge, demanded that Movant shut up. When Movant persisted in his efforts to contact counsel at that instant, a Missouri Highway Patrolman placed a gun at Movant's head and demanded silence.

Momentarily thereafter, Movant was chained and shackled and shanghaied to Springfield, Missouri, and

lodged in the U. S. Medical Center where he was held incommunicado for several days.

Movant was manifestly prejudiced by the denial of his Constitutional Right to phone an attorney at the arraignment supra, for the reason he was shanghaied one hundred and sixty miles away from the locus delicti, and held incommunicado; whereas, if he had been allowed to secure the assistance of counsel at the arraignment supra, additional, valuable time would [24] have been allotted to prepare his defense. That is to say, at the very period that Movant was being held incommunicado, his counsel could have utilized said incommunicado period in the preparation of Movant's defense. Furthermore, when these shocking facts are viewed in conjunction with the undisputed, barbaric treatment superimposed upon Movant immediately after the confession supra, was secured, and while he was in O-Hall, it clearly depicts a full and complete picture of the callous treatment inflicted upon Movant by representatives of the State of Missouri *prior* to said confession.

In Haley v. Ohio, 68 S. Ct. 302, it was stated in no uncertain terms that such callous treatment after a confession must be viewed in connection with what is alleged to have occurred *prior* to the signing of a confession. That is to say, if the officers supra, would deny Movant food, water, and refuse to allow a priest to visit him immediately *after* the confession was made, the imagination don't have to be stretched an iota to assume what these officers resorted to *before* the confession was made. The same train of reasoning applies to Cole County attorney, James. T. Riley, and Foster S. Wheately, Cole County Magistrate Judge, when they flagrantly and belligerently refused Movant the Constitutional right to contact and secure counsel. What was the State of Missouri trying to con-

ceal when they refused Movant the Constitutional right to contact and secure counsel, and refused a humble [25] priest permission to visit Movant in O-Hall. The answer stands out like cancer on our concept of fairness and due process of law. They didn't want anyone to view Movant's physical condition. The same suggestion applies to the aforesaid denial of the right to see an attorney at the arraignment.

It is a well established principle of law, that an accused is entitled to the assistance of counsel at each and every step of the proceedings against him, or he is deprived of his liberty without Due Process of Law, and must be discharged from imprisonment.

For a most recent decision on this proposition, see Hamilton v. State of Alabama, 368 U. S. 52, wherein the United States Supreme Court emphatically stated that to deny the accused the assistance of counsel at *arraignment*, is a denial of Due Process of Law.

This Honorable Court is thoroughly familiar with the numerous decisions that uniformly and unanimously held that the accused is entitled to the assistance of counsel at *each* and *every* step of the proceedings had against him. Therefore, without quoting therefrom, Movant hereinbelow cites several decisions which fully supports the above proposition, and might assist this Honorable Court in arriving at a decision. See:

[26] Powell v. Alabama, 287 U. S. 45
Johnson v. Zerbst, 304 U. S. 458
Gideon v. Wainwright, 372 U. S. 335
Uveges v. Pennsylvania, 335 U. S. 437

James M. Creighton, and Herman Trout, inmates of the Missouri State Penitentiary at the time of the murder supra, and the principal witnesses for the State at the

time of Movant's trial, testified that they had not been promised any reward or other consideration for their testimony. Whereas, in truth and fact, the aforesaid James T. Riley, and E. V. Nash, of the Missouri Highway Patrol, had therefore promised, and thereafter did secure their release from prison in exchange for their testimony.

In *Napue* v. *Illinois,* No. 583 October Term, 1958, the United States Supreme Court stated that the above line of testimony by the State, constituted deliberate use of perjured testimony, that is inadmissible, and entitles the petitioner to his release.

It is respectfully submitted that the Court's reasoning in Napue is just as applicable to Movant today, as it was the day it was rendered.

Movant avers and alleges that the State of Missouri unlawfully withheld substantial evidence that would have been valuable to Movant at his trial.

That is to say, the aforesaid *Herman Trout* testified [27] that the water from Death Row *could not* be turned off from *inside* B & C Basement. This was essential testimony because Trout had theretofore testified that he had turned off the water for Death Row, and *thereafter* observed Movant himself at a wash basin, washing in Death Row.

Richard Gonzales, a former inmate of the Missouri State Penitentiary, and a constant companion of the aforesaid Trout, the night of the alleged murder, gave investigating officers a statement declaring that Trout spent the night in a sub-basement to Death Row the night of the riot, and therefore it was humanly impossible for Trout to observe what he testified to at Movant's trial. This evidence was also deliberately suppressed and withheld by counsel for the State.

James M. Creighton supra, testified that he personally knew William De Lapp, William R. Hoover (co-defendants), prior to the aforesaid murder. However, prison authorities, and counsel for the State, was well aware that Creighton could not have been acquainted with De Lapp and Hoover, because at the time of their birth Creighton was a prisoner at the Missouri State Penitentiary; upon their arrival here, Creighton was in the State Hospital at Fulton, Missouri, and subsequently detained in Death Row. At no time prior to the alleged murder did Creighton have any kind of contact with De Lapp or Hoover, therefore, it was impossible for him to be acquainted with [28] either. Yet, his testimony established a conspiracy between Movant and De Lapp; and his testimony in this respect had a tremendous impact upon the Jury. Counsel for the State of Missouri was well aware of the above, but suppressed it from Movant's counsel, and thereby caused him to be deprived of his liberty without Due Process of Law.

It has been held many times that the deliberate suppressing of evidence favorable to the accused is contrary to the commands embodied in the Constitution, and a conviction resulting therefrom cannot stand.

All of the modern Court decisions state that a defendant must be present at each and every stage of the proceedings of a trial, and must be represented by counsel at every step of the trial, otherwise, any conviction resulting therefrom is contrary to the Due Process clause, and his conviction is a nullity.

Movant alleges and contends that the most vital and crucial stage of a criminal trial is the deliberations of the Jury, and he is entitled to be personally present, and be represented by counsel during said deliberations; otherwise his conviction violates due process of law.

This is a novel proposition, and even in the enlightening period, Movant has been unable to locate a decision wherein this issue has been adjudicated by any court in America.

It is the contention of your Movant and he respectfully [29] alleges that all of the above allegations makes his detention contrary to the United States Constitution, and decisions rendered thereunder, and it is hereby requested that this Honorable Court rule on the *Federal* questions herein involved.

CONCLUSION

It is respectfully submitted that in September 1954, and the months to follow, the population of Missouri was prejudiced against Movant because of the ten million dollar destruction to the State Penitentiary, the news media was so intense throughout the State that it was impossible to receive a fair trial; and a mere information alone would have brought about the conviction of any inmate of the Missouri State Prison at that time. Movant was accused, charged, and convicted in an atmosphere of hatred, and public sentiment that prevented Movant from receiving the fair trial he was entitled to.

However, this is a very enlightened period, and this Honorable Court is not required to sit back on its haunches and allow the within judgment to stand. A judgment is not rendered to import historical knowledge, but it is rendered for the ..... future. That is to say, *today*, can we examine the circumstances under which the judgment supra, was rendered, and say that it don't shock our emotions deeply for a judgment to be based on the facts as hereinabove outlined.

Wherefore, it is respectfully submitted that the [30 aforesaid judgment and sentence should be vacated and held for naught.

Respectfully submitted,

James W. Stidham-Movant-Pro Se.
Box 900—Register No. 65993
Jefferson City, Missouri

VERIFICATION

State of Missouri)
) ss.
County of Cole)

James William Stidham, having been duly sworn according to law, deposes and says: That he is the Movant in the above and foregoing Motion to Vacate, he has read the contents thereof and knows the same to be true and correct to the best of his knowledge and belief.

/s/ James William Stidham

Was subscribed and sworn to before me this Jun 6, 1966.

/s/ Joseph R. Keene,
Notary Public.

My commission expires Oct. 10, 1969.

Filed
Jun 7, 1966
Paul W. Horner
Circuit Clerk.

And thereafter to-wit: On the same day, the following order was entered of record:

Miscellaneous Record, Circuit Court, Butler County, Missouri June 7th, 1966—In Recess—(Book No. 14, Page 519)

[31] Now on this 7th day of June, 1966, comes the defendant James W. Stidham, and files Motion to Vacate Judgment and Sentence in this cause.

And thereafter to-wit: On the 23rd day of June, 1966, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 72, Page 128) June 23rd, 1966, Regular April 1966 Term

Now on this 23rd day of June, 1966, the Court takes up the Defendant James W. Stidham's Motion to Vacate Judgment and Sentence, filed in the Circuit Court of Butler County, Missouri, June 7, 1966. The Court after a study of said Motion and all the files and records in this cause, finds that all the matters and things raised by the defendant was ably represented by counsel; that these matters were raised on appeal and defendant's conviction was affirmed at 305 S.W. 2d 7 and are now before the Supreme Court of Missouri in Case No. 50,806;

WHEREFORE, it is ordered by the Court that Defendant's Motion to Vacate Judgment and Sentence be and the same is hereby overruled and for Naught held.

It is further ordered by the Court that the Clerk send the defendant James William Stidham a copy of this order.

[32] And thereafter to-wit: On the 28th day of June, 1966, Defendant herein, by counsel Pro-Se, files Supplemental Amendment to Motion to Vacate Judgment and Sentence, which Supplemental Amendment to Motion to Vacate Judgment and Sentence, reads in words and figures as follows:

as

In re: James W. Stidham v. State of Missouri

SUPPLEMENTAL AMENDMENT TO MOTION TO VACATE JUDGMENT AND SENTENCE

Comes now James William Stidham, movant in the motion to vacate judgment and sentence now pending before this Honorable Court for consideration, and amends and supplements said motion, to-wit:

1. Movant alleges that the circumstances under which the confession supra, was made, compelled him to be a witness against himself. and,

2. Movant was denied the Constitutional privilege against self-incrimination when the aforesaid confession was used against him. and,

3. Movant was not advised of his Constitutional right to remain silent, before said confession was made. and,

4. Movant was not advised that any statement he made could be used against him. and,

5. Movant was not advised of his Constitutional right to counsel before the aforesaid confession was made; nor did he knowingly, competently, intelligently, or understandingly [33] waive said right. and,

6. At the time the confession supra, was made, movant was in actual and technical custody.

Movant alleges that the Transcript of Evidence now on file in this Honorable Court clearly reflects that movant's counsel repeatedly objected to the introduction in evidence of the confession supra, and said objections were predicated upon what is alleged in the above six paragraphs.

In Miranda v. Arizona, decided June 13, 1966, the United States Supreme Court stated in no uncertain terms

that a denial of any or all of the above constitutional provisions, make a confession involuntary and coercive; violates due process of law, and entitles the accused to his release.

Also see:
Haynes v. Washington, 373 U. S. 568
Spano v. New York, 360 U. S. 315

Wherefore, it is respectfully urged that upon consideration of the foregoing Motion to Vacate Judgment, and what is contained in this Supplemental Amendment, that the judgment and sentence of this Honorable Court should be vacated.

Respectfully submitted,

/s/ James William Stidham

County of Cole)
) ss.
State of Missouri)

Subscribed and sworn to before me this 27th day of [34] June, 1966.

/s/ Joseph R. Keene
Notary Public

My commission expires Oct. 10, 1969.

Filed
Jun 28, 1966
Paul W. Horner
Circuit Clerk.

And thereafter to-wit: On the same day, the following order was entered of record:

Miscellaneous Record, Butler County Missouri, Circuit Court, June 28th, 1966—In Recess—(Book 14, Page 536)

Now on this 28th day of June, 1966, comes the defendant herein, by counsel Pro-Se and files supplemental amendment to Motion to Vacate Judgment and Sentence in this cause.

And thereafter to-wit: On the 30th day of June, 1966, the following order was entered of record:

Miscellaneous Record, Circuit Court, Butler County, Missouri June 30th, 1966—In Recess—(Book 14, Page 538)

Now on this 30th day of June, 1966, mandate from the Supreme Court is filed in this cause.

[35] And thereafter to-wit: On the 30th day of June, 1966, the following order was entered of record:

Circuit Court Record, Butler County, Missouri, (Book 72, Page 134) June 30th, 1966, Regular April 1966 Term

---

Now on this 30th day of June, 1966, the Court takes up defendant's Supplemental Amendment to Motion to Vacate Judgment and Sentence which was filed in the Circuit Court of Butler County, Missouri, June 28, 1966. It appears to the Court that this Pleading is a Supplemental Amendment to the Motion to Vacate Judgment and Sentence which was mailed to the defendant herein. After careful consideration of this Supplemental Amendment to Motion to Vacate Judgment and Sentence, the Court does make and enter its order that said Supplemental Amendment be and the same is hereby overruled for the same reasons as set forth in the court's ruling of June 23, 1966, which are as follows:

All of the matters and things raised by the defendant in his Motion to Vacate Sentence and Judgment were before the trial court; That the defendant was ably represented by counsel; that these matters were raised on appeal and defendant's conviction was affirmed at 305 S.W.

2d 7, and are now before the Supreme Court of Missouri in Case No. 50 806.

It is further ordered by the Court that the Clerk send a copy of this order to the defendant James William Stidham.

[36] And thereafter to-wit: On the 2nd day of July, 1966, comes the defendant herein, by counsel Pro-Se, and files Notice of Appeal, Designation of Record, and Motion for Leave to Appeal in Forma Pauperis, which read in words and figures as follows:

NOTICE OF APPEAL

James William Stidham, defendant in the above entitled cause, hereby serves notice that he intends to appeal to the Missouri Supreme Court the order of this Court denying his motion of June 23, 1966,

Respectfully Submitted,

/s/ James William Stidham

Dated: July 1, 1966

cc: Marion Spicer, Clerk
Missouri Supreme Court
Jefferson City, Missouri

Norman Anderson
Missouri Attorney General
Jefferson City, Missouri

Filed
Jul 2, 1966
Paul W. Horner
Circuit Clerk.

DESIGNATION OF RECORD

The Clerk of this Honorable Court is hereby requested to prepare and transmit to the Clerk of the Missouri Supreme Court the records herein designated:

[37] 1. Motion to Vacate Judgment and Sentence.

2. Supplemental Amendment to Motion to Vacate Judgment and Sentence.

3. Order of June 23, 1966, denying Motion to Vacate Judgment and Sentence.

4. Motion for Leave to Appeal in Forma Pauperis.

5. Order allowing appeal in forma pauperis.

6. This Designation of Record and service thereon.

Said records to be prepared and transmitted to Clerk of Missouri Supreme Court pursuant to the rules of this Honorable Court.

/s/ James William Stidham

cc: Marion Spicer, Clerk
Missouri Supreme Court
Jefferson City, Missouri.

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

James William Stidham, having been first duly sworn according to law, deposes and says: That on June 23, 1966, this Honorable Court denied a Motion to Vacate Judgment and Sentence wherein it was alleged that his conviction was obtained in violation of his Constitutional Rights; defendant alleges that the aforesaid Motion to Vacate Judgment and Sentence is meritorious, made in good faith, well founded in fact and law, and that he is entitled to the redress he seeks therein, but he is without sufficient

funds to make payment for his [38] appeal to the Missouri Supreme Court.

Wherefore, defendant prays for leave of this Honorable Court to appeal the within matter in forma pauperis, and without payment therefor.

Respectfully Submitted,

/s/ James William Stidham

County of Cole)
) ss
State of Missouri)

Subscribed and sworn to before me this Jul 1, 1966.

/s/ Joseph R. Keene
Notary Public

My commission expires Oct. 10, 1969.

Filed
Jul 2, 1966
Paul W. Horner
Circuit Clerk.

And thereafter to-wit: On the 2nd day of July, 1966, the following order was entered of record:

Miscellaneous Record, Circuit Court, Butler County, Missouri July 2nd, 1966—In Recess—(Book 14, Page 541)

Now on this 2nd day of July, 1966, comes the defendant herein, by himself and files Notice of Appeal to the Missouri Supreme Court in this cause.

[39] And thereafter to-wit: On the 8th day of July, 1966, the following order was entered of record:

Circuit Court Record, Butler County, Missouri, (Book 72, Page 162) July 8th 1966, Regular July 1966 Term

---

Now on this 8th day of July, 1966, the Court considers the defendant's Motion to Appeal as a poor person, said motion having been heretofore filed July 2, 1966, with the Circuit Clerk of Butler County, Missouri. The Court after having seen said Motion does make the order that defendant's Motion to Appeal as a Poor Person be and the same is hereby sustained.

It is further ordered by the court that the reporter prepare a transcript of the Circuit Court record and proceedings of this cause from and including defendant's Motion to Vacate Judgment and Sentence filed in this cause June 7, 1966, and all subsequent proceedings to date. Said records to be transmitted to the Clerk of the Supreme Court.

It is further ordered by the Court that the costs be taxed against the State.

[40] STATE OF MISSOURI)
) SS.
COUNTY OF BUTLER)

CERTIFICATE OF COURT REPORTER

I, Leonard W. Ehlers, C.S.R., Official Court Reporter, 36th Judicial Circuit, do hereby certify that I am the Reporter within and for the County of Butler, State of Missouri, in which the foregoing case was tried, and that I prepared the Supplemental Transcript of the Records filed in this case, as per order of the Circuit Judge dated July 8, 1966, and that the above and foregoing is a true and com-

plete copy of all of the pleadings and orders made herein since the 7th day of June, 1966.

/s/ Leonard W. Ehlers, C.S.R.
Leonard W. Ehlers, C.S.R.,
Official Court Reporter,
36th Judicial Circuit,
Poplar Bluff, Missouri.

STATE OF MISSOURI)
) SS.
COUNTY OF BUTLER)

I, Paul W. Horner, Clerk of the Circuit Court, Butler County, Missouri, do hereby certify the annexed to be the typewritten transcript of the record filed on the 21 day of Sept., 1966, in Cause No. 3158, of the causes of this Court, wherein the State of Missouri is Plaintiff and James W. Stidham is Defendant, as fully as the same remains on file and of record in my office.

[41] In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Poplar Bluff, State of Missouri, this 21 day of Sept., 1966.

/s/ Paul W. Horner
Paul W. Horner,
Clerk of the Circuit Court

By:.....
Deputy Clerk.

APPENDIX C—Transcript in: Stidham v. State,

No. 54674

In The
SUPREME COURT OF THE STATE OF MISSOURI

JAMES WILLIAM STIDHAM,	)	
Movant,	)	
vs.	)	Case No.
STATE OF MISSOURI,	)	PCR #109
Respondent.	)	

On Appeal to the Supreme Court of Missouri from the Circuit Court of the City of St. Louis, Division No. 20.

HONORABLE MICHAEL F. GODFREY

TRANSCRIPT ON APPEAL
(Filed July 17, 1969)

Mark M. Hennelly
Attorney for Movant

Byron Kinder
Attorney for Respondent

[1] MOTION TO VACATE UNLAWFUL JUDGMENT AND SENTENCE SUPREME COURT OF MISSOURI

RULE 27.26

On the 12th day of November, 1968 defendant filed Motion as follows: (Caption, affidavit and signature omitted)

"MOTION

"1. Place of detention—Missouri State Penitentiary.

"2. Name and location of court which imposed sentence—Butler County Circuit Court at Poplar Bluff, Missouri.

"3. The case number and the offense or offenses for which sentence was imposed: Case Number 3158. Charge: First Degree Murder.

"4. The date upon which sentence was imposed and the terms of the sentence: Tried and convicted in July 1955; sentenced to life.

"5. Check whether a finding of guilty was made:

"(a) After a plea of guilty—No.

"(b) After a plea of not guilty—Yes.

"6. Did you appeal from the judgment of conviction? Yes.

"7. If you answered "yes" to (6), list

"(a) the name of the court to which you appealed:

[2] "Missouri Supreme Court.

"(b) the result in such court and the date of such result: Affirmed on September 9, 1957 (Number 45,537).

"8. State concisely *all* the grounds known to you for vacating, setting aside or correcting your conviction and sentence.

"(a) See appendix A attached hereto.

"9. State concisely and in the same order the facts which support each of the grounds set out in (8), and the names and addresses of the witnesses or other evidence upon which you intend to rely to prove such facts:

"(a) See appendix A attached hereto.

"10. Prior to this motion have you filed with respect to this conviction:

"(a) Any motion to vacate judgment under Missouri Supreme Court Rule 27.26? Yes.

"(b) Any petitions in state or federal courts for habeas corpus? Yes.

"(c) Any petitions in the United States Supreme Court for certiorari? Yes.

"(d) Any other petitions, motions or applications in this or any other court? No.

"11. If you answered "yes" to any part of (10), list with respect to each petition, motion or application

"(a) the specific nature thereof:

[3] "i. Same grounds as set out in appendix A attached hereto.

"(b) the name and location of the court in which each was filed:

"i. Butler County Circuit Court.

"ii. Butler County Circuit Court.

"iii. Missouri Supreme Court.

"(c) the disposition thereof and the date of such disposition:

"i. Denied in March 1964.

"ii. Denied June 1966.

"iii. Denied in 1966.

"(d) if known, citations of any written opinions or orders entered pursuant to each such disposition:

"i. 305 SW 2d 7.

"ii. 403 SW 2d 616.

"iii. Opinion attached hereto.

"12. Has any ground set forth in (8) been previously presented to this or any other court, *state or federal*, in any petition, motion or application which you have filed? Yes.

"13. If you answered "yes" to (12) identify

"(a) which grounds have been previously presented:

"i. All set forth in appendix A attached [4] hereto.

"(b) the proceedings in which each ground was raised:

"i. Motion under 27.26.

"ii. Motion under 27.26.

"iii. Habeas corpus.

"14. If you have filed prior proceedings in any state or federal court involving this same sentence but did not raise therein one or more of the grounds you now list in (8), state which were not raised in the earlier proceedings and why they were not raised in those proceedings:

"(a) When the first motion under 27.26 was filed with Butler County Circuit Court movant had not been supplied with the trial court transcript and therefore only raised the perjured testimony point.

"15. Were you represented by an attorney at any time during the course of

"(a) your preliminary hearing? No.

"(b) Your arraignment and plea? No.

"(c) Your trial, if any? Yes.

"(d) Your sentencing? Yes.

"(e) Your appeal, if any, from the judgment of conviction or the imposition of sentence? Appeal was taken on the transcript.

"(f) preparation, presentation or consideration [5] of any petitions, motions or applications with respect to this conviction, which you filed? No.

"16. If you answered "yes" to one or more parts of (15), list

"(a) the name and address of each attorney who represented you:

"i. Mark M. Hennelly, St. Louis, Missouri.

"ii. F. Neil Aschemeyer, St. Louis, Mo.

"(b) the proceedings at which such attorney represented you?

"i. Trial.

"ii. Sentencing.

"(c) was said attorney

"i. appointed by the court? Yes; or

"17. Are you now under sentence from any other court that you have not challenged? No.

"18. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes.

"*Appendix A*

"Answers to Question 8.

"1. The trial court erred in admitting into evidence a signed statement of the defendant for the reasons that:

"(a) the trial court's procedure for the determination [6] of the voluntariness of the confession did not comport with minimum standards of due process of law in that the trial judge failed to make a specific finding that said confession was voluntary before submitting the issue to the jury for their determination.

"(b) the overwhelming evidence was that the statement was involuntary and was the exclusive product of coercion used and practiced upon movant by members of the Missouri Highway Patrol and St. Louis City Police.

Said errors deprived the movant of due process of law as guaranteed by the 14th amendment of the Constitution of the United States and Art. I § 10 of the Constitution of the State of Missouri.

"2. Movant was denied his constitutional right to have assistance of counsel at critical stages of his proceedings as guaranteed by the 6th and 14th amendments of the Constitution of the United States and Art. I § 10 and Art. 1 § 18 (a) of the Constitution of the State of Missouri in that he was denied counsel:

"(a) the day after the penitentiary riot.

"(b) during his interrogations.

"(c) during his arraignment.

"(d) at his sentencing.

"3. Movant was denied his constitutional right to due process of law as guaranteed by the 14th amendment of

the [7] Constitution of the United States and Art. I § 10 of the Constitution of the State of Missouri for the reasons that:

"(a) the state knowingly and deliberately used perjured testimony of witnesses Trout and Creighton in that said witnesses denied any promises had been made them in exchange for their testimony, when, in fact, the state had made certain promises in exchange for their testimony.

"(b) the state knowingly and deliberately withheld and suppressed the facts relating to aforesaid promises, which evidence would have been helpful in movant's defense.

"4. Movant, because of the circumstances under which the confession was made and used, was compelled to be a witness against himself in violation of the 5th and 14th amendments of the Constitution of the United States and Art. I § 10 and Art. I § 19 of the Constitution of the State of Missouri.

"5. Movant was not advised before giving his statement that he had a right to remain silent, that anything he said could be used against him in court, and that he had a right to presence of counsel and to have an attorney appointed before questioning if he could not afford one; all in violation of the 5th, 6th and 14th amendments of the Constitution of the United States and Art. I § 10, § 18 (a) and § 19 of the Constitution of the State of Missouri.

[8] "6. Movant was denied due process of law as guaranteed by the 14th amendment of the Constitution of the United States and Art. I § 10 and § 18 (a) of the Constitution of the State of Missouri when the trial court instructed on conspiracy in instructions numbers 4 and 5 for the reasons that:

"(a) the state was allowed to prove and the jury was instructed to consider a crime that had not been included in the indictment.

"(b) the Movant was not adequately advised of the nature and cause of the accusation.

"7. Movant was denied due process of law as guaranteed by the 14th amendment of the Constitution of the United States and Art. I § 10 of the Constitution of the State of Missouri for the reasons that:

"(a) the trial court shifted the burden of proof by failing to include in instruction number 6 that unless they find 'beyond a reasonable doubt' that the confession or admission was freely and voluntarily made, they should not give any consideration to the confession or admission.

"(b) the said instruction was incomplete and inaccurate and did not comport with due process of law in that the instruction did not instruct the jury that a statement is involuntary if it is a product of 'Mental Duress' as well as physical coercion.

[9] "Answers to Question 9.

"1. (a) Petitioner was held incommunicado prior to making the confession.

"(b) Petitioner was expressly denied the assistance of counsel prior to giving the aforesaid confession.

"(c) Petitioner was protractedly, and intensely interrogated twenty-six times by relays of officers during the five-day period before a confession was obtained.

"(d) Petitioner was taken to a distant, lonely and isolated place where the confession was obtained.

"(e) Petitioner's hands were handcuffed behind his back, and numerous officers armed with sidearms and riot guns had petitioner encircled until the moment a confession was made, in the gruelling atmosphere on the hot day.

"Witnesses and evidence to support contention

"Witnesses: James William Stidham, Missouri State Penitentiary.

"S. N. Reese, Missouri State Penitentiary.

"Robert E. Burns, Missouri State Penitentiary.

"Father Al Stevens, St. Lawrence Rectory, 405 - 7th Street, Monett, Missouri.

"Mr. & Mrs. W. S. Stidham, 110 North Benwiley, Santa Maria, California.

"Foster S. Wheatley, Jefferson City, Missouri.

[10] "Thomas P. Rose, Jefferson City, Missouri.

"Evidence: Transcript of trial and newspaper articles.

"2. James William Stidham, Missouri State Penitentiary.

"3. Frank Guinan, Missouri State Penitentiary.

"4. Transcript of trial.

"5. Transcript of trial.

"6. Transcript of trial.

"7. Transcript of trial."

(Filed—November 12, 1968.)

STIPULATION FOR CHANGE OF VENUE

Thereafter, and on the 21st day of June, 1968 stipulation for change of venue was filed, as follows: (Caption and signature omitted)

"It is stipulated by and between the parties hereto that the above-entitled cause may be removed to the Circuit Court of the City of St. Louis, Missouri; This stipulation is expressly limited to the hearing of the pending cause under the provisions of Rule 27.26 and is in no way binding upon the parties hereto with respect to any other or further proceeding herein."

(Filed—June 21, 1968.)

ORDER FOR CHANGE OF VENUE

[11] Thereafter, and on the 21st day of June, 1968, the Court entered the following Order: (Caption and signature omitted)

"It appearing to the Court that the above named parties have duly made, and timely filed with the Clerk of this Court a proper Stipulation for Change of Venue; That they have paid to the Clerk of this Court a sum of ten dollars; That all of the pleadings in the case resulting in issues have been filed with the Clerk of this Court, and that the question of change of venue in the case has been otherwise duly presented to the Court, it is ordered that this case is hereby removed to the Circuit Court of the City of St. Louis, Missouri. The original file shall accompany the transcript."

TRIAL

The trial of the above-entitled cause began on the 5th day of December, 1968, before the Honorable Michael F. Godfrey, Judge, presiding in Division No. 20 of the Circuit Court of the City of St. Louis, State of Missouri. Mr.

Byron Kinder, Prosecuting Attorney, and Mr. Seneca Nolan, Assistant Circuit Attorney, appeared for and in behalf of the State. The defendant, James William Stidham, appeared in open court, in person, and in the custody of the Sheriff of this City, and in the presence of his attorney, Mr. Mark Hennelly.

[12] THE COURT: Let the record show that this proceeding is being held in open court, in the presence of the defendant, his attorney and in the presence of the assistant circuit attorney and the Court has before it for consideration the case of James W. Stidham v. the State of Missouri, PCR No. 109, further identified as C-1479-68.

Gentlemen, you may proceed.

MR. HENNELLY: Your Honor, there was a conference which I had with the Prosecuting Attorney in which we entered into certain stipulations. Did he ever write those up?

MR. KINDER: He has not. Our court reporter is in the hospital so I do not have those stipulations. They have not been transcribed or prepared, your Honor.

MR. HENNELLY: That's all right. We both recall what they were.

MR. KINDER: Yes, sure can.

MR. HENNELLY: I wanted to make a motion at this time, your Honor, and I have discussed this—I'll tell the Court frankly—with the Prosecuting Attorney and he would not acquiesce in this, quite understandably. At the time of this original trial I filed a Motion for a polygraph test for the defendant and the Court turned it down and the Supreme Court upheld that position, and at the time of the conference I again made a request and that was turned down, but now that we are in the hearing I would again ask the Court please to [13] permit the defendant to take a lie detector test, a polygraph test, touching upon any phase of his participation in the 1954 prison

riot. In the event there was any question about the costs I would be satisfied to have the costs paid for by the defendant in the event they didn't want to have it done by the Police Department of the City of St. Louis.

MR. KINDER: Your Honor, I object to it for two reasons; the first reason is that the polygraph has not been established as a scientific, reliable instrument and not admissible in Court, and, secondly, all that a polygraph exam, were it a scientific, reliable instrument, would prove would be the guilt or innocence of this defendant and that is not an issue in a 27.26 hearing. For those two reasons, your Honor, I respectfully submit that the Motion is not well taken.

MR. HENNELLY: Obviously, I do not ask for the exam for the reason that it would have any substantive value other than the fact that it touches upon the credibility of the defendant with respect to what he will testify to in Court here, your Honor, so that's the basis of it.

THE COURT: Well, let the record show that the Motion of the defendant petitioner is overruled on the basis that the Court feels—considers it to be without the scope and purview of this hearing on the 27.26; further, the probative value of the polygraph test certainly has not been [14] satisfied to this Court's intention or to the general proceedings of law it has not been established as an absolutely scientific method of determining the truth or untruth and for that reason the Motion is denied.

MR. HENNELLY: Your Honor, at the time of the conference in Jefferson City we had some discussions about the official transcript in the Supreme Court in which we wanted to introduce certain records of the official transcript into this record. Whatever came—

MR. KINDER: Mr. Hennelly, the transcript that was on file with the Court of—Circuit Court of Butler County is in the possession of the Judge in this particular cause

at this time. I turned those documents over to the Court this morning.

MR. HENNELLY: Could we then, your Honor, by leave, introduce into the record and make part of this record— On this transcript it's Page 300, which was my cross-examination of Mr. Creighton. Page 300.

THE COURT: What volume would that be?

MR. KINDER: I believe Volume I, your Honor.

MR. HENNELLY: Yes, I'm sure.

THE COURT: Three hundred?

MR. HENNELLY: Yes, your Honor.

THE COURT: All right.

MR. HENNELLY: I want the record to include—this [15] this is just a short bit of it, your Honor—from Page 300. (Reading): Q. Mr. Creighton, at any time prior to today, has there been any offer made of any kind to you by the prison authorities or by the Prosecuting Attorney, with respect to a parole of any kind? A. None whatsoever. Q. Never been any talk about that at all? A. No. Q. And you are up here testifying and you have never even discussed with them anything about anyone doing anything for you, for your testimony, is that right? A. That is right.

Then I would ask the Court, on Page 356, the same volume, with respect to the cross-examination of Mr. Trout by me. (Reading): Q. And of course you haven't been offered anything at all for your testimony, have you? A. That is right, I haven't. Q. And has there been any discussion at all about cutting down your time, or any parole or anything? A. No, sir. Q. Never was mentioned in the course of all of your discussions, is that right? A. Never has.

I would ask the Court to accept that as part of our proof, and I believe that's agreeable with the prosecutor.

MR. KINDER: Yes.

THE COURT: It will be accepted.

MR. HENNELLY: I would like to now have marked as Defendant's Exhibit 1 a statement by the Secretary of State, an officially authenticated copy, which reflects the following with respect to Mr. Trout and Mr. Creighton:

(Defendant's Exhibits 1 & 2 marked for identification.)

[16] (Reading): I, JAMES C. KIRKPATRICK, Secretary of State of the State of Missouri, hereby certify that *Herman Trout* was sentenced to 10 years in the Missouri Penitentiary on January 3, 1944. He was released under Commutation of Sentence on January 13, 1956 by Governor Phil M. Donnelly.

James Creighton was sentenced to a term of life in the Missouri Penitentiary on January 17, 1933. He was released under Commutation of Sentence on January 13, 1956 by Governor Phil M. Donnelly.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of my office. Done at the City of Jefferson, this 7th day of November 1968. And this is authenticated by James C. Kirkpatrick, Secretary of State.

MR. KINDER: No objection.

THE COURT: It will be admitted.

(Defendant's Exhibit 1 admitted into evidence.)

MR. HENNELLY: Now, your Honor, one of the sections of our Motion touches upon the charge that the defendant was convicted of a crime which was not specifically set out in the Indictment and I refer to Section 6 of the Motion.

Our position in that respect, your Honor, is that the defendant was not charged in the Indictment with conspiracy but charged with being a principal and as proof thereof—even though it's part of the official record—I would ask leave of Court to introduce Defendant's Ex-

hibit 2, which is a copy of the Indictment. You have no objection. That's [17] part of the record in this case anyway.

MR. KINDER: That's right.

MR. HENNELLY: Then, your Honor, I would ask leave of Court to introduce as Defendant's Exhibit 3—Instructions 4 and 5—which we take the position the defendant had not been previously apprised of. These are part of the official records also, your Honor.

(Defendant's Exhibit 3 marked for identification.)

Now, your Honor, with respect to Defendant's Exhibit 3, I have already directed the Court's attention to Instructions 4 and 5 and another section of our charge under this motion is that Instruction No. 6 was erroneous in that it did not include the question of mental duress, which will be part of the proof in this case, and I would ask the Court to accept in evidence also as part of Defendant's Exhibit 3 Instruction No. 6.

THE COURT: Very well.

MR. HENNELLY: Your Honor, at this point I want to put the defendant on the stand but I wonder if the Court would give me about five minutes to speak with him, please.

THE COURT: Yes.

(Discussion between defendant and his attorney.)

MR. HENNELLY: Would you be sworn?

JAMES WILLIAM STIDHAM,

being sworn, testified:

Direct Examination by Mr. Hennelly

[18] Q. What is your name, please? A. James William Stidham.

Q. You're presently an inmate of the Missouri State Penitentiary, Mr. Stidham? A. Yes, sir.

Q. And you're the movant in the Motion that is presently pending before this Court, is that right? A. Yes.

Q. Would you tell his Honor what your criminal record is, Jim? A. Well, prior to this I've been convicted of robbery and the Dyer Act.

MR. HENNELLY: Speak up otherwise it's very difficult for her to get it now.

Q. (By Mr. Hennelly) How much time did you get on robbery? A. Twenty-five years.

Q. When did you get that sentence? A. It was in—I think it was May of 1952.

Q. May what? A. May 28, 1952.

Q. When were you sentenced on the Dyer Act? A. That was in 1941.

Q. You had finished that time in a Federal institution, is that right? A. Yes, sir. That was two Dyer Act charges.

Q. Now, with respect to the twenty-five years that you got for robbery, I want to direct your attention to the night of the riot and I want to ask you, immediately prior [19] to the riot, with respect to your confinement in the penitentiary, what was the nature of your confinement at that time? A. Well, I had been in solitary confinement for quite some time before the riot. Let's see. I think I was put in there in January of 1953.

Q. In January of 1953? A. Yes, sir.

Q. And you were in solitary confinement at the time of the riot? A. Yes, I was.

Q. And had you been in continual solitary confinement from January of 1953 up until the time of the riot? A. Yes.

Q. Now, for the purposes of the record, when you say you were in solitary confinement, tell his Honor just where in the penitentiary property you were situated. A. Well, it was in two different buildings. At the beginning I was placed in what they call E-3. That was just an old isolated building, on the third floor. They place prisoners

in solitary for various offenses they might commit around the prison.

Q. Excuse me. Let me stop you there. Was that where you were at the time of the riot? A. No, sir. I stayed only on E-3 until—

Q. Wait a minute. Now with respect to E-3, how many quarters were there for solitary confinement? [20] A. There were several. I would say there was probably sixty cells.

Q. And were you visited by anyone during that time? A. No, sir.

Q. And in how big a room were you confined? A. About five by seven.

Q. And what was the furniture in that room? A. There was no furniture in there. All you had was a steel bunk suspended on a roll with a straw tick to sleep on. Didn't have any kind of bed clothes or pillow.

Q. What were the toilet facilities in there? A. It was an old dilapidated toilet and wash basin.

Q. How was the food served to you? A. Through the bars.

Q. Now, with respect to the bill of fare which they had in the general population—

MR. KINDER: Your Honor, I object to this line of questioning as being immaterial and irrelevant to this particular proceeding, how the man was fed, clothed and housed prior to the riot, prior to the crime complained of.

MR. HENNELLY: Excuse me. Your Honor, part of this proof—and I think that there is a substantial body of law to uphold this position—that where a defendant has been confined in solitary confinement, under certain circumstances, that it has a direct and in many, many instances a totally [21] vitiating impact upon anything that he says at the end of or during that solitary confinement,

and the proof in this case is going to show that a man who was in solitary confinement for two years—

THE COURT: Overruled.

MR. HENNELLY: Go ahead.

THE WITNESS: In E-3 it was a silent system up there. You weren't allowed to converse with anybody other than the guards. If you was caught talking to some other prisoners the guard would come in and whip you with clubs, and the conditions were pretty bad because there were thousands of cockroaches in the building, pigeons even come in your cell, large rats running around there. You wasn't allowed any kind of recreation, fresh air or religious services.

Q. (By Mr. Hennelly) How long were you under those conditions? A. I was under those conditions from January of 1953 until I think it was July 12th of 1954. I'll tell you, the conditions in E-3, it was so bad that the F.B.I. they made a thorough investigation.

Q. Now, when were you transferred from the "E" Hall? A. I believe it was July 12, 1954.

Q. Where did you go from there? A. I was taken to Death Row.

Q. Into Death Row. A. Yes, sir.

[22] Q. Could you tell his Honor what were the conditions on Death Row? A. Well, on Death Row you didn't even have a bunk to sleep on, all you had was a straw tick on the floor. They give you a real meager diet three times a day.

MR. KINDER: I'm sorry, I did not hear that response.

THE WITNESS: You had to eat a small diet three times a day. Didn't get much to eat.

THE COURT: "Diet" did you say?

THE WITNESS: Yes. I wasn't allowed any visitors at all while I was on Death Row. The only one that could communicate with me would be the guard.

Q. (By Mr. Hennelly) What was the size of the room that you were housed in on Death Row? A. It was approximately seven by nine.

Q. And the furniture that was in there, was it nothing other than the— A. That was all, just a straw tick on the floor.

Q. Was there any difference in the food from the "E" Hall to Death Row? A. Well, it wasn't any better.

Q. Now, from the time that you were originally put into solitary confinement in 1953 had you been out at any time for any purpose? [23] A. Yes, I had been in Cole County Circuit Court on—

Q. When was that? A. That was around—I believe it was about December of 1954. —I mean, December, 1953.

Q. And had you—Outside of that single instance in which you were over in Cole County Circuit Court, had you been continually in solitary confinement from 1953 till the time of the riot? A. Yes, sir, 1953 till the time of the riot.

Q. All right. Now, aside from the nature of the surroundings and the nature of the food that you have discussed with the Court, had you been subjected to any disciplinary action by the guards for any infraction of the rules during that period of time? A. At that time the guards more or less decided for themselves when they—you violated a rule they would whip you with clubs or—

MR. KINDER: I'm going to ask that that be stricken as not being responsive to the question, speaking generally, and the question was directed in particular to him, your Honor.

THE COURT: Sustained.

Q. (By Mr. Hennelly) Let me ask you specifically: Were you beaten at any time during those years? A. Yes, I was quite often.

[24] Q. How many times would you say? A. Well, I'd say at least seven times probably.

Q. Did this have any effect upon your health in any way? A. I'd say it had—I'd say the beatings and the confinement together, I'd say, had a great effect on my mind as well as my health.

Q. Now, you, of course, are familiar with the date of the riot, aren't you? A. Yes, sir.

Q. And at that time, as you have indicated to the Court, you were on Death Row. A. Yes, sir.

Q. Approximately what time did the riot begin? A. Around 6:00 o'clock in the afternoon.

Q. And where were you at that time? A. I was on Death Row.

Q. In the closed quarters that you have indicated? A. Yes.

Q. How long were you confined within your quarters there before you got out into the general population in the course of the riot? A. I believe the riot started around 6:00 o'clock and I got out of my cell at approximately 8:00 o'clock.

Q. Do you remember who let you out? A. No, sir. It was some colored fellow. I don't remember who it was. I think it was Ford.

[25] Q. Sir? A. I think it was Ford.

Q. Ford was the boy that was on Death Row with you? A. Yes, sir.

Q. And after you got out of your cell tell his Honor what happened. A. After I was released from my cell I went upstairs to "B" Hall, and just roamed around for probably an hour or so, and then went in the cell and listened to the radio and got something to eat and drink some coffee. I stayed there for the remainder of the night.

Q. You stayed there how long? A. For the rest of the night, till the riot ended.

Q. And when did the riot end? When was it under control by the authorities? A. Around 7:00 o'clock on September 23rd, 7:00 o'clock in the morning.

Q. Now, at that point where were you? A. I was upstairs in "B" Hall.

Q. Now, you're familiar with the late Mr. Donnell? A. Yes, sir.

Q. And I'll ask you, did you have anything to do with killing him during the riot? A. No, sir, I didn't.

Q. And after the—after you were taken into custody where did they take you then? A. I was in a cell upstairs in "B" Hall and some officers taken me out and taken me downstairs and put me in my original [26] Death Row cell.

Q. Do you recall who those officers were? A. No, sir, I don't.

Q. At that time that you were taken from "B" Hall and put in your—back on Death Row, were there any members of the St. Louis Police Department present? A. Do you mean did they escort me back down?

Q. Yes. A. Yes, sir, there was one—seems to me like it was a Major on the St. Louis Police Department.

Q. And can you tell us what happened, if anything? A. Well, when I got back to my cell, the entire floor was covered with water, probably three or four inches of water all over the floor on Death Row and my straw tick had become water logged. After the riot ended, from the time I was put back in the cell until the time I was moved from it, about five or six days later, I had to catch naps on the commode on account of the water being in the cell all the time. Immediately after I was put in the cell there was some officers stopped by there and started questioning me about the murder of Donnell. I told them that I didn't know anything about it, didn't participate in it, and he stayed for the next five or six days. There'd be groups

of officers come to my cell and they'd make different kinds of threats to me.

[27] Q. When you say "different kinds of threats", be specific for the Court. A. Well, they would call me different kind of vulgar names, even threaten to shoot me if I didn't tell them what happened with respect to that murder.

Q. Who was it that was doing that? A. Well, there was St. Louis officers and Missouri Highway patrolman. Apparently they had groups that would make regular rounds in Death Row, groups of officers, and several times each day they'd stand and harass me in my cell.

Q. From the time you were taken from "B" Hall into Death Row until the time you left Death Row, how many times were you questioned and what was the length of time you were questioned? A. I could estimate it twenty-five times. I don't think I would be underestimating.

Q. How long would each session of that questioning be? A. It would vary. Sometimes about—only last three or four minutes; sometimes maybe ten minutes.

Q. Was there any physical abuse during that period of time? A. No, sir, not during that time.

Q. Were you moved out of Death Row for that questioning or did all that questioning take place right in the same cell? A. On three different times I was removed out of [28] Death Row for questioning.

Q. The first time where did they take you to? A. First time it was about 3:00 a.m. on September 23rd I was taken to the Prisoner Classification Room.

Q. How long were you questioned there?

MR. KINDER: Your Honor, I'm having difficulty hearing this man. I heard "3:00 a.m. on the 23rd of September".

THE WITNESS: To the prison classification room.

MR. KINDER: Speak loud.

Q. (By Mr. Hennelly) Now, did they awaken you to take you there at that time? A. Yes, sir.

Q. And— A. Well, I was just sitting on the commode. I might have been dozing off but I wasn't asleep I don't think.

Q. Who questioned you under those circumstances? A. I remember a Lieutenant Barton and, offhand, I don't recall the rest of them. There were several of them.

Q. Tell his Honor what happened in the course of that interrogation. A. Well, they asked me what I knew about the murder of Donnell and what I knew about the riot. I told them I had been in solitary for nineteen months and I couldn't know anything about the riot and the position I was in I couldn't participate. They got pretty threatening and abusive. Seemed [29] like they were satisfied that they knew I did have something to do with the murder of Donnell but I guess I stayed there about an hour and a half and they sent me back to my regular cell.

Q. Did anybody threaten you under those circumstances? A. Yes, sir, they threatened—they told me I would probably get killed if I—beat to death or injured in some manner if I didn't admit my participation in the murder.

Q. When was the next time you were questioned away from your Death Row cell? A. I think that was on September 26th.

Q. Where did they take you then? A. Same place.

Q. And who did the questioning? A. I think Lt. Barton was present at that time and Mr. Nash too, I believe, and there was some others too, I don't recall.

Q. And did the questioning follow pretty much the same procedure as had been followed in the previous interrogations? A. Yes, sir.

Q. And how long did that questioning take place? A. Probably about an hour.

Q. How far would you have to go from your cell on Death Row to the Classification Room? A. Oh, about a fifth of a mile.

[30] Q. Was it— It was, of course, in a different building, wasn't it? A. Yes, sir.

Q. And during this period of time was the general penitentiary area taken over by the State Police and by the St. Louis Police Department? A. Internal guards, yes, sir.

Q. Internal guards. And they were there and visible, were they, as you would make this trip back and forth? A. Yes, sir.

Q. And when was the third time that they questioned you? A. That was in a shack on the lower yard of the main prison, what they call the field house. That was on September 27th.

Q. Who did that questioning? A. Well, there was two highway patrolmen— Sgt. Little and R. C. Caldwell— and there was—

MR. KINDER: I couldn't hear the second.

THE WITNESS: R. C. Caldwell. There were four St. Louis officers. There was— I believe their names were Rinderer, Jessie Rinderer, Elmer Overbeck, Charles Billings and Walter Eitzman.

THE COURT: Just a minute. Why don't you move that table up a little bit?

MR. KINDER: Could we, your Honor? It's awfully [31] heard to hear.

Q. (By Mr. Hennelly) How long did that interrogation take place? A. Probably an hour and a half. I don't term it an interrogation myself. I think it was accusation because as soon as I walked in they began accusing me of the murder of Walter Lee Donnell. I don't recall ever being asked if I did it by those officers there.

Q. In all three of these interrogations were there officers present with side arms? A. Yes, sir, side arms and riot guns too.

Q. Can you tell me in this third interrogation was there any threats made against you? A. Well, when I first entered the room I was placed in a chair. I had my hands cuffed behind me. They took the handcuffs off from behind me. I was placed in a chair—it was something like a G.I. belt and it was placed around my ankles. There was a heavy coat placed on me. My hands were again handcuffed behind me and after that was completed, well, Lt. Eitzman, he said he wanted to know about my participation in the riot and murder of Walter Lee Donnell. I told him I had already been questioned about twenty-five, twenty-eight times. Each time I stated I did not participate in the murder or the riot either. I'd be willing to take a lie detector test or truth serum to show them I didn't have anything to do with it, so at that time Lt. Eitzman told them to [32] give me a lie detector test. Apparently a rope had been tied on the handcuffs because I was lifted off the floor and all my weight was made to bear on my arms, and handcuffed behind me.

Q. How long were you in that position? A. Oh, I was up two different times and— I'd say the first time I was probably hung up fifteen minutes.

Q. Rather uncomfortable, I presume. A. Very uncomfortable.

Q. After that interrogation did you change your story? A. Well, they let me down after fifteen minutes and tried to talk me into giving a statement that they would dictate to me. I still declined so they hung me back up again in the same position. It was a corkball bat in the shack there. They beat me with the corkball bat over my body while I was hanging there. I lost consciousness twice while I was hanging up. I felt my left hand and arm be-

come paralyzed. It was a nervous spasm and it became numb. I assumed it was paralyzed. I decided to go along with their wishes, you know, and I wrote—

Q. You wrote a statement, did you? A. Yes, sir.

Q. You say that it was dictated to you? A. Yes, sir.

Q. Who dictated it? A. Sgt. Little of the [33] Highway Patrol and Walter Eitzman, both.

Q. Now, what did they do after they dictated the statement for you to sign? A. What did they do?

Q. Yes. A. Shortly after then they put me over in "O" Hall. That's another isolation.

Q. That was in isolation again? A. Yes.

Q. Now, at any time during the course of these interrogations and these movements did you have any lawyer with you? A. No, sir, but I made all the efforts I could to obtain a lawyer.

Q. How did you do that? A. Well, one or two days after the riot I sent my parents a registered letter. I wrote them a registered letter and I asked them to immediately come see me with a lawyer. The letter was not allowed to leave the prison.

Q. What other efforts did you make to get a lawyer? A. I tried to bribe a couple of guards to call me a lawyer. That didn't work too good.

Q. Who was your lawyer in those days? A. The lawyer I was trying to secure at that time was Richard Weber out of Carthage, Missouri. He was the one I was trying to contact.

Q. Now, after the paper was signed and you were taken [34] to "O" Hall, how long did you remain in "O" Hall? A. It covers a span of three days. I went in about 12:30 or 1:00 on the 27th and I believe that was on a Wednesday. I'm not sure what day of the week it was but three days later why I was taken over to Magistrate Court, Cole County.

Q. During those three days that you were in "O" Hall were the circumstances under which you were held there similar to the circumstances under which you had been detained for the months prior in solitary confinement? A. No, sir, they were worse. Didn't have anything at all to eat in "O" Hall. Didn't feed you anything. No water, didn't have no water. All it was was just a bare floor and as I recall the only thing I had was a pair of pants on, and as far as that goes, even after I was returned to my regular Death Row cell, after the riot had completed, I didn't have anything to eat at all till the day I went over to Jefferson City to Court.

Q. How long were you without any food of any kind? A. The riot ended on the 23rd. I went to Court, I think—I'm not sure—but I think I went to the Cole County Magistrate Court on the 29th. As we went out of prison they give us two rolls and some coffee.

Q. Give you what? A. Two rolls and some coffee.

Q. When you got to the Magistrate Court did you make [35] any further attempt to get a lawyer? A. Yes, sir, I did.

Q. What—Tell the Court the nature of that attempt. A. Well, I asked the Magistrate Judge if I could phone an attorney. At first he told me he would call him, you know. I told him—I insisted I wanted to call him. He wouldn't let me. And I knew that I was fixing to be taken to Springfield, Missouri and I felt that I needed a lawyer at this time and so I shouted out in the courtroom, I asked if a lawyer was present in the courtroom, and I shouted two or three times.

Q. Now, excuse me. This was in the Magistrate Court in Cole County on what date? A. I believe it was September 29th.

Q. Did any lawyer step forward? A. No, sir, they didn't but later on there was some lawyers told me they were present.

MR. KINDER: I object to what some lawyers told him as hearsay.

THE COURT: Sustained.

Q. (By Mr. Hennelly) Now, was this your arraignment day? A. Yes, sir.

Q. Now, tell me what was your purpose in seeking a lawyer at that time? A. Well, before the confession was obtained some [36] officers took me in front of Creighton, which was one of the State witnesses in this case, and the officer asked him to identify me as participating in the murder and Creighton told them I wasn't one of them, you know, but at that time I wanted to get a lawyer for two reasons, one was to get that statement from Creighton before somebody might entice him to change his mind and I also wanted a lawyer to examine my physical condition. At that time my body was a mass of bruises. I had lost about twenty-five pounds of weight during those interrogations and I thought that I should have a lawyer at this time.

Q. Did you think you needed a lawyer for further immediate investigation? A. Yes, sir, I did.

Q. What was the general nature and atmosphere in the penitentiary at that time? A. You mean from the official standpoint?

Q. Yes. A. Very hostile at all times. In fact, it was even hostile in the courtroom. You could even feel the hostile atmosphere there. Every time we went in court there was numerous officers in there, have riot guns and rifles and pistols. In fact, while I was demanding a lawyer at my arraignment in Magistrate Court they were trying to make me shut up and one of them nudged me with a gun before I finally shut up.

Q. Was this a time of continuing investigation and [37] interrogation by the authorities in the penitentiary? A. During the entire week, yes, sir.

Q. And it was under those circumstances that you sought out a lawyer, is that right? A. Yes, sir.

Q. Now, what judge were you arraigned in front of? A. Foster S. Wheatley.

Q. You remember the time of the day or night that was? A. Well, this was probably 9:00 or 9:30 in the morning.

Q. It was on this occasion that you shouted out in the courtroom? A. Yes, sir.

Q. And now were you arraigned by yourself or were you arraigned in a group? A. In a group.

Q. And I'll ask you, did they read the Indictment to you? A. They read the Information, yes, sir.

Q. Was it an Information at that time? A. At that time, yes, sir.

Q. And did they ask you at that time if you wanted a lawyer? Did the Court ask you if you wanted a lawyer? A. No, sir, he didn't ask me because I insisted—I was going to try to make arrangements to get a lawyer, Richard Webster, at that time and later on I found out that he did appoint some attorney but the attorney, he didn't see me the day of arraignment.

MR. KINDER: I object. The best evidence of what [38] he's testifying are the records that are in this Court's possession, as to what was done in regard to the appointment of an attorney and what transpired in the Magistrate Court, and they are in the Court's possession.

THE COURT: Well, that would be hearsay but I'm going to let it stand. Overruled.

THE WITNESS: The record does show that Judge Wheatley appointed John Obin (sic) but I didn't get to see him until, I'd say, a month later.

Q. (By Mr. Hennelly) Let me ask you this, Jim: At the time you were arraigned that first time were you represented by counsel? A. No, sir.

Q. Had you seen—Had you talked with anyone at that time? A. No, sir. For several months prior to that the only ones I talked to was prisoner officials or Highway Patrolmen or St. Louis Policemen.

Q. But from the time of the night of the riot up until the time of your original arraignment on the Information, had you talked with your parents or with any friends or with any clergymen? A. No, sir. I was under complete control and domination of the prison officials of the Missouri Highway Patrol and St. Louis Policemen from the night of the riot—well, with one exception. Immediately after I was returned to Death Row why Father Stevens—he was [39] a Catholic priest at the penitentiary—he came down to Death Row and he asked me who killed Donnell—I told him I didn't know. He just briefly walked by there.

Q. That's the only person that you saw? A. Yes, sir.

Q. Now, when was the first time you had any physical connection with a lawyer? A. First time that I had any physical connection with a lawyer was—I would have to guess. I would say that it was six weeks.

Q. Who was that lawyer? A. That was John Obin. He came to see me very briefly and I told him—well, I didn't discuss any of my case with him, I just merely told him I was going to try to make arrangements to get a lawyer and the next morning we went in the Magistrate Court for a preliminary hearing and he walked up and asked the Judge to dismiss him. The Judge dismissed him.

Q. Now, as you know, Father Clark was instrumental in my being appointed to represent you. Did you talk

to Father Clark at any time? A. Yes, sir. I was in Cole County jail after being in Springfield for probably thirty days and at my request Father Clark, he came up to see me and he asked what he could do for me. Well, I didn't know you personally at this time but told him, you know, that I would like to have you as a lawyer [40] and, from what I understood, he talked to you about it and arranged it for me. Then later on I asked the Judge to appoint you as my attorney.

Q. Now, Mr. Stidham, that original Information, I believe, was dismissed, is that right? A. Yes, sir, it was.

Q. And what was the nature of your plea at that original Information? Did you make a plea of guilty or not guilty or anything? A. Not guilty.

Q. Subsequently, as you well know, the Grand Jury of Cole County returned the Indictment. Now, were you brought over for a subsequent arraignment on the Indictment? A. Yes, sir, I was.

Q. Now, do you remember what date that was? A. No, sir, I don't recall what day it was. It seems to me like it was around Thanksgiving, 1954.

Q. At that point had you had a lawyer yet? A. No, sir.

Q. And were you arraigned in front of Judge Sam Blair? A. Yes, sir, about 9:00 o'clock at night.

Q. And at that point had you had any conversation with any lawyers yet? A. No, sir I—other than this John Obin just for a couple of minutes.

Q. And did you have any discussion with Judge Blair with respect to counsel for you at the time of that arraignment? [41] A. Yes, sir, I asked him to appoint you as my attorney.

Q. And did you make a plea to the Indictment at that time? A. I don't recall whether I made a plea or the Judge entered a plea of not guilty for me.

Q. Was that Indictment read to you then? A. Yes, sir.

MR. KINDER: Your Honor, I believe—May I interject a point? I believe the best evidence of this is the Court record and I believe the record reflects that on the 23rd of November Mr. Hennelly was present at this man's arraignment.

THE COURT: All right. Is that agreeable, Mr. Hennelly?

MR. KINDER: It's in the Court file, your Honor.

THE COURT: Well,—

MR. HENNELLY: Off the record.

(Discussion off the record.)

THE WITNESS: I'll say this, at the time Mr. Hennelly was appointed as my lawyer there was no lawyers in the courtroom, no spectators in the courtroom. It only was the Missouri Highway Patrolmen. Mr. Hennelly was appointed when I was arraigned before Judge Blair and I would say it was two weeks after that arraignment before Mr. Hennelly appeared in Cole County Court.

[42] MR. KINDER: I'd just like to keep the record in order. If there's disagreeing with the official documents as filed, the record will reflect—and the Court can see—the Indictment was filed the 23rd of November. Next entry is on the 23rd of November—Hennelly was appointed to represent Stidham and Vidauri. That maybe is the instance that he's talking about. So we can keep the Court in time sequence here.

THE WITNESS: I can tell you what date you appeared for the first time. The date you appeared the first time you filed a Motion to suppress the statement. Whatever date is on that Motion to suppress the statement that's the first date you appeared.

MR. KINDER: December 6th is the next date—entered a plea of not guilty, then withdrew the plea of not guilty and proceeded to file Motions. We're in agreement on that. Do you remember those circumstances?

MR. HENNELLY: No, I don't but the record will show.

THE COURT: All right. Let's proceed.

Q. (By Mr. Hennelly) Now, after we had the trial in Poplar Bluff and you were sentenced in Poplar Bluff by the late Judge Randy Weber, my office associate, Mr. Aschemeyer, was present with you, is that right? A. Yes, sir.

Q. And I was not here but he was there, is that right? A. That's right.

MR. HENNELLY: I have no further questions.

[43] *Cross-Examination by Mr. Kinder*

Q. Mr. Stidham, at the point of time when you were sentenced by the Court in Butler County, sir, had you talked to Mr. Aschemeyer prior to the time that you went into Court with him? A. No, sir.

Q. Didn't the Court at that time, and it was on—I don't know what date the sentence took place—it's a matter of record—but didn't the Court interrogate you as to Mr. Aschemeyer's representation in your behalf? A. I believe that the Judge—I believe Mr. Aschemeyer advised the Judge that he was down here on Mr. Hennelly's request to represent me. I think the Judge asked me if I had any objection to it. I couldn't object to it.

Q. Didn't you tell the Court you had no objection to Mr. Aschemeyer's representation? A. I would say that I probably did.

Q. Well, did you or didn't you? A. I didn't have any alternative.

Q. Answer me, did you or did you not object, sir? A. To my knowledge I didn't object.

Q. That's right, sir

You testified that you were placed in solitary confinement. What have you—In January—Was it the 18th of January, '53 that you were put in? A. I can't recall the date, Mr. Kinder. It was somewhere [44] around there, I believe.

Q. All right, sir. And you were placed in there for a period of one year, were you not, for attempting to escape from the penitentiary? A. I believe that was the sentence to begin with.

Q. All right, sir. A. I wasn't released but—I wasn't released at the end of the year.

Q. All right. Could you tell the Court why you weren't released at the end of the year? A. I don't know.

Q. Well, isn't it a fact that at the end of the year you were kept in "E" Hall but you were transferred to a less secure place within "E" Hall into a facility that had more pleasant surroundings than the one which you had spent your year? A. No, sir. At the end of the year I remained in the same cell during the entire—

Q. Weren't you moved from the third floor to the second floor? A. No, sir, I never was on the second floor of "E" Hall.

Q. How many years had you spent in penal institutions prior to your incarceration in the Missouri State Penitentiary? A. I think about ten years.

Q. All right, sir. Did you receive regular visitors during those periods of time? A. Yes, sir.

Q. All right. Before you were placed in administration [45] segregation when was the most recent time a visitor had come to see you? A. I don't recall.

Q. You didn't receive frequent, regular visitors in the Missouri State Penitentiary, did you, prior to the riot? A.

Yes, sir, I receive frequent visitors in the Missouri State Penitentiary now.

Q. I'm talking about prior to the riot. A. Yes, sir.

Q. On what sort of basis? A. Oh, probably three or four times a month.

Q. All right, sir. What sentence are you presently serving at this time? A. I'm serving a life sentence.

Q. Have you done that twenty-five years? A. Yes, sir, I've been locked up for about seventeen years.

Q. Was that sentence commuted, the twenty-five year sentence? A. No, I served it.

Q. All right, sir.

MR. HENNELLY: I guess the last time amounted to the seventeen years, did it?

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THE WITNESS: Yes, sir.

Q. (By Mr. Kinder) When did you commence serving the last sentence? A. February 2nd of this year.

[46] Q. Of this year? A. Yes, sir.

Q. Do you recall who the trooper was, sir, or troopers were that took you from your cell in "O" Hall to your—I mean in Death Row, as you refer to it, to your first interrogation; do you remember who those gentlemen were? A. From Death Row to my first interrogation?

Q. Yes, sir. A. No, sir, I don't.

Q. Were they the same gentlemen who interrogated you? A. You mean did they remain at the interrogation?

Q. Yes, sir. A. They remained present, yes, sir.

Q. And, as I understand your testimony, the first few interrogations outside of your cell which you make reference to were conducted by Lt. Barton of the Missouri Highway Patrol, is that right? A. Yes, sir, he was present.

Q. Was he the one interrogating you? A. Yes, sir.

Q. And I understand your testimony to be, the man that dictated the confession which you wrote out by hand was Percy Little, is that right? A. Yes, sir, and Lt. Eitzman.

MR. KINDER: I don't believe I have any further questions.

MR. HENNELLY: Your Honor, we filed a Motion—[47] a subpoena duces tecum for certain police records in this case and I wonder if they were ever delivered into the Court or any return made on that.

THE COURT: You may step down.

(WITNESS EXCUSED.)

(Discussion off the record.)

MR. NOLAN: Was that on the record?

MR. HENNELLY: No, but I'm going to put it on the record.

CHARLES BILLINGS,

being sworn, testified:

Direct Examination by Mr. Hennelly

MR. HENNELLY: I think, your Honor, that for the purposes of this record that we are putting this officer on as an adverse witness. He's an officer that testified on behalf of the State in the original case and I'm putting him on for the limited purpose of asking him a question about the subpoena duces tecum.

THE COURT: All right. Proceed.

Q. (By Mr. Hennelly) What is your name, please? A. Detective Charles Billings.

Q. Sgt. Billings, did you have reason to make a search of the records of the St. Louis Metropolitan Police Department for any and all records which applied to the participation of the Police Department in the 1954 prison riot? A. Yes, sir, I did.

[48] Q. And have you brought any records with you? A. No, sir, there were none available.

Q. There are none available? A. No, sir.

Q. Can you tell his Honor how many of you officers were up there at that time? A. There were a hundred and two police officers from St. Louis.

Q. How long were you up there? A. The greater majority returned after about three days and twenty-five of us remained for about approximately another week.

Q. There is not in existence any record of any kind in the St. Louis Metropolitan Police Department? A. No, sir, not at this time. It was only made up for the report. It wasn't an official report. There was never a complaint number made on it and it was just to take care of the expenditures and time involved.

MR. HENNELLY: I have no further questions.

MR. KINDER: I have no questions.

Cross-Examination by Mr. Nolan

Q. Officer Billings, when you conducted this search of the records was that this week? A. Last week and this week.

Q. Was that search conducted because of a subpoena directed to you or any of your superiors, that you were aware [49] of? A. No, sir, it was by your request.

Q. It was my request. A. (Nods head.)

MR. NOLAN: That is all.

MR. HENNELLY: I have no further questions.

(WITNESS EXCUSED.)

THE COURT: Court is in recess.

(Thereafter, Court stood in short, temporary recess after which time Court convened again and the following proceedings were had in open Court, in the presence of the defendant, and respective counsel.)

MR. HENNELLY: Your Honor, the defendant has asked that the witnesses for the State be segregated.

THE COURT: All right. Sustained.

MR. HENNELLY: Your Honor, we had anticipated putting on Mr. Aschemeyer in this case but he told us originally that he was in a trial in Washington, D.C. and that he may not be back in time, and I would—We're finished with our evidence as we have it now and in the event that he would come in any time during the day we'd ask leave to put him on, but we're finished with our affirmative evidence.

THE COURT: All right.

MR. KINDER: I'd like to call William Barton.

STATE'S EVIDENCE

[50] WILLIAM S. BARTON

being sworn, testified:

Direct Examination by Mr. Kinder

Q. Would you state your name, sir? A. W. S. Barton.

Q. What is your occupation, Officer? A. Highway patrolman.

Q. What was your occupation in the year 1953, sir? A. I was also a highway patrolman at that time.

Q. Do you know the petitioner in this cause, Mr. James Stidham? A. I know him, yes.

Q. Did you have occasion to see him in the month of September, 1954, sir? A. I seen him.

Q. Did you ever during the month of 1954 interrogate this man? A. Never.

Q. Were you ever present in any room at any time when he was interrogated? A. Never did; never was.

Q. Would you briefly, sir, tell the Court what your function was in the course of the quelling of the Missouri Prison Riot in 1954, sir? A. Well, I was assigned to the night crew of investigating of the riot, arson, everything else in connection with the riot, and they was a group of officers also with me but I was in charge of that particular group.

Q. Now, did you interrogate some of the men who were ultimately charged with the murder of one Walter Donnell? [51] A. Oh, yes, sir.

Q. But you didn't interrogate this man, did you, sir? A. No, sir, I did not.

Q. This may be redundant but did you interrogate him on the 23rd of September, '54? A. No, sir, I never did interrogate him.

Q. How about—Then I assume your testimony would be the—nor did you interrogate him on the 26th of September. A. No, sir.

Q. Do you recall whether you saw him either of those two days? A. I don't recall but I probably did see him but as far as talking to him, interrogating him, I never did and never have.

MR. KINDER: I don't believe I have any further questions.

Cross-Examination by Mr. Hennelly

Q. Lieutenant, you testified in the murder case down in Poplar Bluff, didn't you? A. Yes, sir.

Q. Have you had reason and opportunity to examine your testimony recently about that? A. No, sir, I have not. I haven't seen it.

Q. Sir? A. No, sir.

Q. What is your present position with the State Highway Patrol? A. Captain, Troop "C", Kirkwood.

[52] Q. When were you made Captain? A. September, 1962.

Q. And at the time of the riot what was your— A. Lieutenant.

Q. Did you have anything to do with the original attempt to contact Creighton and did you interrogate Creighton? A. Yes, sir, I was the first officer to find him.

Q. Did you talk to Trout? A. Trout? Yes, sir; yes, I talked to Trout.

Q. How long did you talk to them, to both of them? A. Well, I don't know. I talked to them on several occasions.

Q. Well, would you say really that you were in charge of the State Highway Patrol investigation that night, the night of the riot? A. I wasn't appointed in charge of the night duty until the following night.

Q. Well, the following night then would you say that you were in charge of the investigation? A. Part of it.

Q. Now, tell me which of those defendants did you question? A. What defendants I questioned?

Q. Yes, sir. A. Laster, Noble, Hoover, Stidham—not Stidham, pardon me—DeLapp and Vidauri.

[53] Q. Then your testimony is really that you questioned all of the defendants except Jim Stidham. A. It's what?

Q. You had a part in the interrogation of all of the defendants that were charged in the murder but Jim Stidham. A. Oh, no, no. Kenton was also charged with him.

Q. You didn't question Kenton? A. No, sir.

Q. I presume that you were called down in the 27.26 motion for Kenton, were you? A. No.

Q. Turn to page 116.

Is it your testimony that you didn't have anything to do with the questioning of Kenton? A. I said Kenton. I didn't say I didn't question him.

Q. Well then you questioned— A. I did question him.

Q. Well, I thought that you said a minute ago that beside Stidham that the one of them you didn't question was Kenton. A. Well, I don't— that's—I'd like to have that read back, Judge.

MR. HENNELLY: Well, I'll clear it up.

THE COURT: Well,—

Q. (By Mr. Hennelly) Did you question every defendant [54] in this case but Jim Stidham? A. No, sir.

Q. Which ones didn't you question? A. I didn't question him.

Q. Stidham. Which other ones of the defendants? A. I don't recall. At some time or other I probably talked to all of them.

Q. Except Stidham. A. Yes.

Q. Turn to page 116. I'm sure you recall our trial down in Poplar Bluff. A. Oh, yes.

Q. I'm going to ask you—and I'm referring now to Page 116 of Volume I of the transcript—(Reading): Q. And when was the first time, after you had arrived there on the night in question, that you saw the Defendant, James Stidham? A. I saw him, oh, it was during the night, I don't know what time it was. Q. And where did you see him? A. He was standing out just off of the lobby on the same floor level, on the B side of the cell blocks. Q. And would the position you saw him be indicated on State's Exhibit 1 there? A. I can't do it there. Q. You mean— A. That isn't what I am talking about. That isn't the floor level I am referring to. Q. Tell us with respect to that State's Exhibit 1, where was he, was he upstairs or outside? A. He was upstairs above this. Q.

All right. Did you question him or talk to him at that time? A. I had no reason to. Q. Did you question or talk to him at anytime after the night of the 22nd? A. I talked [55] to him on the night of the 23rd. Q. Now, where was that questioning, where did that questioning take place? A. In the Classification Room, just off of the large tunnel across from the Deputy Warden's office. Q. You know what time of the day or night that was? A. Well, I judge it to be around about—between eight and nine, somewhere in that neighborhood, sometime after we had gone to work. Q. Now, the Classification Room Lieutenant, is there furniture in there? A. Yes, there is seven or eight chairs and a table.

Now, these were the questions that I asked you on cross-examination and I want to ask you whether or not you recall now testifying in this case some thirteen or fourteen years ago the fact that you did, as a matter of fact, question Jim Stidham in the Classification Room A. Well,—

Q. You do— A. The record speaks for itself. I don't recall talking to him. We talked to an awful lot of them the next few nights and possibly I did talk to him but didn't take any statement from him.

Q. Wouldn't you say, Captain, that your memory would have been better immediately after the incident and at the time of the crime than it is today? A. Probably was.

Q. Now then, I want you to try and refresh your memory and I want to ask you after you think about it if you don't [56] recall questioning him? A. Do I recall questioning him do you say?

Q. Yes. A. Actually I don't recall. Like numerous others, because as I explained a while ago we talked to hundreds of them, I guess, that particular night—not that particular night, of course.

Q. I want to refer to Page 118 of Volume 1, and this was again the recross-examination. (Reading): Q. Now Lieutenant, I am going to show you what has been accepted in evidence as State's Exhibit 11. At the time you questioned the Defendant Stidham, was it in that room that is reflected on State's Exhibit 11? A. That is right. Q. And at the time he was brought in, was he seated at that table? A. Yes. Q. And at that time was he handcuffed, if you know? A. No, sir. Q. And how many men were there questioning him at that time? A. Well, I don't recall, five or six of us. Q. And was he sent back to his cell then? A. That is right.

Now, I want you to think back a little bit, Captain, and see if you recall the circumstances under which he was questioned that night. A. Well, I'll have to say that—like I stated a while ago, that we talked to so many that first time immediately following the riot—which would have been the next night, actually—and I don't recall now any more than I did a while ago.

[57] Q. But you recall questioning all of the others except Stidham? A. Well, I won't say that we questioned him that night.

MR. HENNELLY: I have no further questions.

MR. KINDER: I have no further questions.

THE COURT: You may step down.

(WITNESS EXCUSED.)

MR. KINDER: May this witness be excused, your Honor?

THE COURT: Mr. Hennelly?

MR. HENNELLY: Yes, I have no further questions.

MR. KINDER: Thank you, Mr. Barton.

Mr. Percy Little, please.

P. R. LITTLE,

being sworn, testified:

Direct Examination by Mr. Kinder

Q. Would you state your name, sir? A. Percy R. Little.

Q. And what is your occupation, Mr. Little? A. At present I'm a field representative of the State Board of Healing Arts.

Q. Mr. Little, what was your occupation on the 22nd of September, 1954? A. I was a Missouri State Highway Patrolman.

Q. How long were you on patrol after September 22, 1954? A. Until 1956.

[58] Q. Were you involved in the quelling of the riot which took place in the Missouri State Penitentiary on the 22nd of September, '54? A. Yes, sir.

Q. Would you tell the Court what your function during the days following September 22nd was, sir? A. Well, following the riot there were some Highway Patrol officers and some St. Louis police officers that were assigned to attempt to find out who was responsible for the murders and the arson that had occurred there.

Q. And what was your capacity in that investigation, sir? A. I was one of those officers that were so assigned.

Q. Were you in charge of a detail? A. No.

Q. Who was in charge of the detail you were assigned to, sir? A. I don't recall. See, it was a night and day operation there and I'm not sure—I'm not sure who may have been in charge of the day force. Sergeant Nash was also there at the time.

Q. Do you know the defendant, James Stidham? A. I remember the name and remember of his involvement there, yes.

Q. Did you have occasion during the course of the investigation of the murder of one Walter Lee Donnell to either [59] interrogate Mr. Stidham or to be present while he was interrogated? A. There were many interrogations at that time. I do faintly remember being present during the interrogation of this subject.

Q. Do you remember how many times you were present when he was interrogated? A. No, really I don't remember one time.

Q. All right, sir. If I may, with leave of Court and with Mr. Hennelly's acquiescence, I don't want to separate this exhibit. I just want to use one part. May I mark it all as one exhibit?

MR. HENNELLY: Which is this, the statement?

MR. KINDER: The statement and other documents attached to it as they were used in Court, and I don't want to separate them. I just want to offer this one particular part of the statement, your Honor.

THE COURT: All right, mark it.

(State's Exhibit A marked for identification.)

Q. (By Mr. Kinder) Mr. Little, I will show you that which has been marked State's Exhibit A, which is composed of four photostatic pages. I want to call your attention only to the last page of that document, of those documents, sir, and I'll ask you if you will, for the record, identify that document. [60] A. Well, this appears to be a photostatic copy of a statement that was made by this defendant in Jefferson City.

Q. By the defendant you mean James Stidham, sir? A. Yes.

Q. Were you present when that statement was taken? A. Yes.

Q. Is your signature anywhere on that document, sir? A. Yes, it is.

Q. And did you witness his statement? A. I witnessed the signature, yes.

Q. Now, do you remember when that took place, sir? A. No, I really don't. It was during the daylight hours, I can remember that. I note that the date is entered on this statement but that would be the only way I would recall it.

Q. All right, sir. Assuming that that date on the statement is correct, September 27th, were you present during the total time that Mr. Stidham was interrogated prior to the statement having been taken? A. By "total time" you mean from the time that—

Q. From the time he was brought to the place where the statement was written till it was written. A. I don't believe I was present the total time.

Q. All right, sir. A. Now I'm not sure about that. I don't know because, as I say, this was one [61] of several and I'm not sure but as I recall it—and I'm stating this not from direct memory of exactly what happened but because of the fact of the procedure that was being followed—I think that I would say it would be more specific to say that I was in and out during the time of that. I don't think that I stayed there during the entire time.

Q. Do you remember how long the interrogation took place, sir? A. No, I don't.

Q. Mr. Little, during the time that you were present at the execution of this instrument, was Mr. Stidham at any time physically abused in your presence? A. No.

Q. Did he ever complain to you of having been physically abused? A. No.

Q. Do you recall what his physical appearance was at the time this statement was written? A. Seemed normal to me. I don't think I'd seen him very many times before, if I remember. I don't know whether I had seen him at all but I'm sure at this time there was nothing

about his appearance that would indicate any difference than any other time.

Q. Did he complain of being hungry, tired or thirsty? A. No.

Q. Did he complain to you or any of the officers in your presence and in his presence that he wasn't being fed [62] or that he hadn't had water? A. No.

Q. Did he appear, if you remember, sir, to be suffering from malnutrition or from hunger? A. No, I don't recall any such appearance as that.

Q. Now, this statement is handwritten. Do you know in whose hand it is, sir? A. Well, as I recall it, Stidham wrote this thing himself; however, I'm not sure that I could swear to that but that's my remembrance on it. He wrote it.

Q. Did you dictate this statement to him? A. Well, no.— You mean by "dictating", tell him what to write?

Q. Yes, sir. A. Oh, no; no.

Q. Did you threaten him? A. No.

Q. Did you threaten to kill him? A. No.

Q. Did anyone in your presence threaten to kill him? A. No, not in my presence.

Q. Do you know whether anyone threatened to kill him, that is, of the police—

MR. HENNELLY: Well, I'll object. That's a conclusion.

THE WITNESS: Not in my presence.

MR. HENNELLY: That's sufficient. That's all right. Not in his presence.

[63] Q. (By Mr. Kinder) When you first saw him do you recall whether or not he was handcuffed? A. Well, I can't remember whether he was already in the room when I got there or whether I— I would assume he was handcuffed if he was brought down through the yard but I don't recall him being handcuffed in the room.

Q. Do you recall whether or not you or any of the other officers in the room at the time of the interrogation and at the time that this statement was written were armed, sir? Did you have a weapon on your person visible? A. I believe so, yes.

Q. Would you tell the Court what, if you recall, sir, what the conditions were inside the penitentiary on the 27th of September, on the day of this confession? A. Well, with reference to the physical condition of the prison, there had been a lot of fire and there was a lot of destroyed building and it was— I think that the whole condition would be somewhat unsettled. I think that it would have been, at least not later that the riot, would have been considerable question as to whether or not the prison was entirely secure at that time.

Q. Was that the reason why you and the other officers were armed, sir? A. Oh, yes, we were all armed. As I recall, all the uniformed personnel in there were armed, yes, sir.

[64] Q. This was a time of chaos, was it not, sir, inside the penitentiary? A. It was settling down at that time but I think at that time we did not consider the prison completely secure, as I remember it.

Q. Did you ever talk to Mr. Creighton or Mr. Trout? A. Yes.

Q. Did you talk to them before or after you talked to the defendant or the petitioner, Mr. Stidham? A. Before.

Q. Did you indicate to Mr. Stidham what had been told to you by Mr. Creighton and Mr. Trout?

MR. HENNELLY: I'll object to that, if your Honor please; hearsay and a conclusion on the part of the witness.

THE COURT: No,— Read the question back.

(Question read by the reporter.)

THE COURT: Overruled.

MR. HENNELLY: Excuse me, your Honor. I think he's trying to do here by indirection that which he cannot do by direction, and I refer the Court to the case of State of Missouri versus Chernick in which an attempt was made to use this type of question and then let either the Court or the jury take what is only conclusion from it—and that is that whatever was told him by Trout and Creighton amounted to a certain type of testimony. Now, they couldn't put that [65] testimony in in direct examination—Trout and Creighton isn't here—but this is an attempt to put it in indirectly, and I'll cite the case of Chernick which specifically held that to be inadmissible and reversed on Judge Mayfield.

MR. KINDER: Well, your Honor, I'm not trying to elicit what was told him. The question was intended to garner from this witness whether or not he had told this man that he had had conversations with Creighton and Trout.

MR. HENNELLY: I understand what he's trying to do.

THE COURT: What is the citation on that case?

MR. HENNELLY: I don't know the citation, your Honor. It was tried about 1956, tried twice, reversed twice—State of Missouri versus Chernick—and I'll tell you what the facts were.

They tried to do exactly the same thing by suggesting that the reason Chernick made certain statements was because of what somebody else said and they couldn't put it in the case in chief so they let the jury conclude what was told them and that was held to be reversible error.

THE COURT: Well, I'll sustain the objection on the representation to this Court that this case holds what you say it does.

MR. HENNELLY: That's right, your Honor, I make that representation.

THE COURT: You understand the objection? They're [66] not trying to elicit what was said.

MR. HENNELLY: I understand that. But indirectly they elicit what was said because obviously the purpose of that question is to let the Court think that Trout and the other man told him something and that they when they turn around to the defendant and they say to the defendant, Trout and the other one told me something, that then he reacts in a certain way, and that reaction of his is in effect putting into evidence by indirection what they can't put in by direction.

THE COURT: On your representation that the case holds what you say it holds—

MR. HENNELLY: I'll stand by that, Judge.

THE COURT: All right. Proceed.

MR. KINDER: What was the Court's ruling?

THE COURT: Sustained.

MR. KINDER: All right, sir.

May I ask the Court's indulgence just a moment? I want to read over this old transcript.

Q. (By Mr. Kinder) May I ask you this, Mr. Little? Did anyone promise Mr. Stidham anything in return for his having written out this statement? A. Not as far as I know. I didn't.

Q. Did anybody in your presence? A. No.

Q. Did you see anybody strike the defendant on the legs [67] and body with a corkball bat? A. No.

Q. Did you see anybody tie a rope upon any handcuffs to a beam or something in the room? A. No.

Q. Did you see any time that you were in that room any such device capable of hanging this man in the position in which he described here in Court this morning, that is, by these handcuffs from some member in the building? A. No, I don't know what they're talking about.

MR. KINDER: I have no further questions.

Cross-Examination by Mr. Hennelly

Q. Mr. Little, how long had you been with the State Highway Patrol at the time of this riot? A. I went on patrol in '32. I was gone for six years and except for that time I'd been on the patrol throughout that time.

Q. So you were on the patrol from '38 to '56, weren't you? A. No, from '32.

Q. Yes, but didn't you go back on in '38? A. No, I went on the patrol in '32. I was in service from the end of the 1940's until Spring of '47 and the remainder of the time I was on the patrol.

Q. Now, tell me again the date that you took this job with the Healing Arts group with the State of Missouri. A. It was in 1964.

Q. '64? A. Beginning of '64.

[68] Q. 1964? A. Uh-huh.

Q. And at the time of this interrogation what was your rank? A. Sergeant.

Q. And did— When you left were you a sergeant then too? A. Uh-huh.

Q. What time did you first arrive at the penitentiary the night of the riot? A. I think it was about 9:30 or 10:00 o'clock.

Q. Were you there with the original contingent that came in? A. No.

Q. Who was in charge of the entire group for the State Highway Patrol? A. Well, I suppose the superintendent would have been.

Q. Who was that at that time? A. Colonel—

Q. Wagner? A. Wagner.

Q. Was he on the scene? A. He was there, in and out, yes.

Q. Now, had you been—Did anyone give you some specific duties at the penitentiary? Were you on a team

of interrogators or anything like that? A. Well, I don't know that any team of interrogators was actually set up. By remaining there during that period of time we would, I would say, automatically become part of an interrogation.

[69] Q. So that you— You took part, I presume, in a number of interrogations, did you? A. Yes.

Q. Now, besides the defendant, Jim Stidham, were you present at the interrogation of Vidauri, the little Mexican boy? A. I don't know.

Q. What about Noble? A. Those names are—I can't distinguish those people one from the other. They were—there were a lot of people interrogated but I just can't distinguish one name from another because I've had very little contact with them since and I just don't remember them.

Q. Let me try it a different way. Did you testify in each of the trials? A. I don't think so.

Q. Do you know which trials you didn't testify in? A. No.

Q. You testified in a number of them, though, didn't you? A. I testified in some of them.

Q. Now, I want to ask you: The exhibit which Mr. Kinder has introduced as State's Exhibit A, you recall generally what room that statement was taken in? A. I believe—I can't say that I remember specifically where that statement was taken but from what I've heard around here I would assume it's at the Athletic Building.

[70] Q. You don't recall of your own knowledge though where it was. A. I can't separate one from another, that's the trouble, in that period of time. It's quite possible that Stidham was interrogated but I couldn't swear for sure that he was. It was in a room, I know, but I'm not sure where.

Q. Had you been present at any prior interrogations of Stidham prior to the time the statement was taken? A.

I do not recall having talked to Stidham prior to this entry. I may have but I don't recall it.

Q. Do you recall whether or not up until the time that this statement was taken that Stidham had been denying that he was in—had anything at all to do with the murder? A. Well, I have testified that I do not recall having talked to him prior to this time. Now at that time, at the time of the beginning of this conversation in this statement, it would be my recollection that he at that time said that he was not guilty.

Q. Said he was not guilty. A. (Nods head.)

Q. Now, I want to get the general setting in that room. How many of you were there other than the defendant? A. I don't know.

Q. Well, there are some statements on—signatures on here. A. The signatures of the people on that statement were, [71] I'm sure, put on at that time, therefore, they were in the room at that time. As to whether or not they had been in there—how much they had been in there I certainly am not in a position to recall.

Q. Now, listed on here as witnesses, Lt. Walter Eitzman—at least at that time Lieutenant—Patrolman Overbeck, Patrolman Charlie Billings, Jenneman and R. C. Caldwell. Now at least four of these police are St. Louis Police Department personnel. Did they have pistols with them in that room? A. I don't recall whether they did or not. If they were in uniform I assume they did have but I can't remember those details.

Q. What about riot guns? A. Well, I believe that it was customary procedure for the members of the Highway Patrol to have riot guns. I would assume that I had one because we were carrying them at that time and all the time we were out in the yard.

Q. As a matter of fact, even in answer to Mr. Kinder's statement it was a period of chaos and you were there to maintain order, weren't you? A. That's right.

Q. And don't you recall now that everyone was armed? A. No, I certainly don't recall that everyone was armed. I don't recall who all may have been in there but I do believe—it's my belief that everybody who was in uniform [72] had some sort of weapon, sidearms or, in case of the Highway Patrol, shotguns.

Q. Now, with respect to the time the statement was taken, were you of a group that went to the cell and got Stidham or was he brought to you in the room; do you recall? A. I don't think that he was brought to me and I don't recall having gone to his cell to get him. I don't recall how he happened to be in the room or how I happened to be there. I mean as to who was first or what, I don't remember.

Q. Well, do you know how long he was in the room denying the fact that he had anything to do with the murder before this statement was made? A. No, I don't.

Q. Was he handcuffed when you first saw him? A. That is what I don't remember. If I saw him when he was brought from the cell down there I again would assume that he was handcuffed. If he was already in the room and not in the process of being moved from one place to another I would assume he was not handcuffed.

Q. Who was the main interrogator in the case? A. Well, that would be difficult to say, as to who was the main interrogator. I don't know.

Q. Was there a table in that room? A. I believe there was.

Q. Were there chairs around the table? A. Yes, I believe so.

[73] Q. Was Stidham standing or sitting at the time of the interrogation? A. Well, I don't remember. There wouldn't have been any point in him standing. I think he would have been sitting. I don't remember.

Q. Were the officers standing or sitting? A. I think the officers were sitting mostly and they would— I don't think that anyone stayed in the room all the time. I think that it would be common practice for people to get up and move and go out and get a drink and come back or whatever.

Q. Do you know how long the defendant was in that room at the time this statement was taken? A. No, I don't.

Q. Was it an hour, two hours, three hours; do you have any idea at all? A. I noticed in the part of the statement that I saw a minute ago that it was given at 2:00 p.m. or something, thereabouts, and I would— I don't know. I can't answer that. I just don't remember but I wouldn't say that he had been in there for any very great length of time, certainly not before the noon hour.

Q. Would it be a fair statement to say that you really don't remember anything about this matter except for the fact that nobody did anything wrong in terms of harming the defendant; that you recall clearly, don't you? [74] A. No, I would not say that is the only thing I remember about the statement. I testified that I remember being present at the time the statement was made. I remember participating in the interrogation and I certainly would not limit my recollection of that negative thing.

Q. Who had the paper, for instance? The defendant didn't come in with a paper and pen, did he? A. No, I'm sure he didn't.

Q. Who had this with them? You don't know that, do you? A. I don't remember. It wasn't me because I'm sure I wasn't carrying a briefcase or I would not have had paper.

Q. Was everything that was written in this statement written straight out by the defendant? A. It was written by him, yes.

Q. And was there anyone counseling him or even talking to him while this statement was being made up? A. Yes.

Q. And isn't it a fact of the matter that the counseling and talking they were doing was telling him what to put in the statement. A. That is a little bit difficult for me to explain. I would not say that Stidham was not directed as to the format of that thing. For instance, the opening paragraph, the identifying paragraph, that is typical of a statement that I [75] may have taken in my experience.

Q. Can we agree then at least that part was dictated? A. I assume that I probably directed him as to how to make that opening paragraph but not as to the facts in the opening paragraph but as to just the format of it, how to put it down.

Q. Well, what about the sequence? A. The sequence?

Q. The sequence of events as they are recalled in the statement. Did you make any suggestions to him as to how that might be? A. Probably some.

Q. Did— A. Not as to what the facts of the matter were but as to the format in which to put it in there, but not specific wording for the thing. He may have been directed. I say he may have been because again I'm saying that I don't remember exactly what took place right in that statement but he may have been directed as to the format of the thing but not as to the facts in it.

Q. You don't even recall whether you were there for the whole thing, do you? A. The taking of the statement?

Q. Yes. A. I was there during the time that the statement was written, yes.

Q. You remember that. That is one thing we can be [76] certain that you remember. A. I'm sure that I was there throughout the time.

Q. For the entire writing of that statement, is that right? A. Yes.

Q. Now, was there anyone else that made any suggestions to the defendant as to the format or the style upon which he should write this? A. Well, I don't believe. If I testified that I was the only one that may have made suggestions I don't think that I intended to testify to that but I'm sure that I did participate in that. As to being the only one that made any suggestions, I wouldn't say that.

Q. Now, this particular building that we're referring to, were there armed guards on the wall around the building, outside the building? A. Well, this building—if it's the one that I'm thinking of—is not very close to a wall and I don't believe that that building would be considered to be right immediately adjacent to any guards, no. The main wall, it seems to me, is some little distance away from this building. This building is out in the middle of the athletic area, as I recall it, if that's the building I'm thinking about.

Q. You think you might even be wrong about the building? A. I remember that there was some interrogations made in the building that was a part of the athletic setup of this [77] prison, and that was out in the yard, and I assume that is the building that is under consideration here but again I am not absolutely positive that that was the building in which Stidham was interrogated from my own recollection. There were interrogations made in a number of different places.

Q. Turn to Page 503.

Do you know who was taking notes in that room? A. From what— Any particular agency you have in mind? I think that probably if Sgt. Nash was in there—and I believe he was—he would probably have been the one that would have been making notes for the Highway Patrol Department.

Q. Do you recall now whether or not the defendant had been manacled during the questioning up until the time that he started to write this statement? A. No, I don't remember.

Q. You don't remember that.

Turn to Page 504. I want to ask you if I asked you this question down in Poplar Bluff. (Reading): Q. And was he, during this first interrogation when the oral statement was given, was he handcuffed then? A. I think he was handcuffed until the time that he started the writing.

Do you recall my asking you that question and you giving that answer? A. I— No, I do not.

Q. Was this— Is it your testimony that this was the [78] only written statement that the defendant gave, that he didn't write out something and scratch it out and finally put it down in this form that you wanted or was this the only one that was done? A. I don't remember.

Q. You think it's possible that there may have been some other statement written out at that time? A. By Stidham?

Q. Yes, by Stidham. A. No, I don't remember. I don't recall.

Q. You indicated something a minute ago about 2:30. Where did you pick that time up, 2:30? A. Isn't that on there somewhere, either at the heading or the—

MR. KINDER: 12:30.

THE WITNESS: Was it 12:30?

Q. (By Mr. Hennelly) You just looked at it wrong there, Mr. Little. A. I guess I didn't see the "one" in front of it. I thought it was 2:30.

Q. But you don't recall how long he was in the room before he finally finished signing it? A. No.

Q. Could it have been three hours? A. Well, I'm sure I wasn't around there three hours, not at that time.

[79] Q. Well, did you walk in and out of the room? A. That's my recollection, that almost everyone did. I don't think anybody stayed in there the whole time.

Q. So that what you're telling us is that no one strung him up from the ceiling while you were there, is that right? A. That's right.

Q. Turn to Page 404.

I believe you indicated you didn't have any papers with you or any files of any kind, is that right, when you were in that room? A. I don't believe that I had any files of any kind.

Q. I want to ask you if this question wasn't asked by me and if you didn't give this answer: (Reading): Q. Did you ask any of the questions? A. I think I did. Q. Was there, did you have with you, any of the folders and files of the identification section of the Penitentiary of the Defendant at that time? A. No, I don't think so. I had a folder, but I don't think it had anything to do with him in particular.

Do you recall that question being asked and that answer given? A. No, I don't.

Q. Did you subsequently check to find out whether or not even the age of the defendant was accurate in this statement? A. I don't think so.

Q. As a matter of fact, much of the material that was [80] taken to put in this statement was taken out of some erroneous file and identification folders which were in that room, weren't they? A. No, I wouldn't—Will you ask that question again, please?

Q. I'm asking you if it isn't a fact that the material which was put into this record, such as his age, his prior residence, the fact that he had three prior convictions, were all erroneous, but that they were taken from erroneous folders and files which you had brought into the room? A. No, I surely don't recall anything like that.

Q. Well, have you checked, for instance, where it said he had three prior convictions, the record is clear that he didn't have three prior convictions. A. I don't know.

Q. Was there any attempt made to check back on that? A. When?

Q. After the statement was taken or at any time since that time. A. I certainly haven't made any effort to check it.

MR. HENNELLY: I have no further questions.

Redirect Examination by Mr. Kinder

Q. Mr. Little, did you tell the defendant Stidham what to put in his statement, as far as facts are concerned? A. No, not as far as facts. That's what I say, it's kind of hard to explain. I did not— I'm sure that I did not [81] tell him the facts or rather the allegations that are made in that thing but the only control that I would have exercised over the thing at all would have been to have him put it in a format that would have been consecutive or chronological or in the position that it should be in for a statement, but not as to what is in there, not as to the facts that are in there.

MR. KINDER: I have no further questions.

MR. HENNELLY: I have no further questions.

MR. KINDER: May this witness be excused?

THE COURT: Mr. Hennelly?

MR. HENNELLY: I have no need for him.

THE COURT: Mr. Little, you may be excused.

(WITNESS EXCUSED.)

THE COURT: Gentlemen, I think we're going to recess for the noon luncheon period. Court is in recess until 1:15.

(Thereupon, Court stood in recess for the noon luncheon period after which time Court convened again and the following proceedings were had in open Court, in the presence of the defendant and respective counsel:)

MR. KINDER: Thomas Jenneman.

THOMAS JENNEMAN,

being sworn, testified:

Direct Examination by Mr. Kinder

Q. Would you state your name, sir? [82] A. Thomas Jenneman.

Q. And what is your occupation? A. Police officer.

Q. City of St. Louis? A. Yes, sir.

Q. How long have you been in that occupation, sir? A. Twenty-seven years.

Q. Officer, do you recall where you were in the month of September, 1954 from the 23rd to, say, the 30th of September? A. Up at the Penitentiary.

Q. Were you there in connection with a prison riot which occurred there at the prison penitentiary? A. Yes, sir.

Q. Do you know the defendant, James Stidham? A. I remember him.

Q. All right, sir. Is he present in this courtroom? A. Yes, sir.

Q. Would you point him out? A. Right there, sir. (Indicating).

Q. Did you have occasion to see him on the 27th of September, '68? A. To the best of my knowledge I'd say yes.

Q. I'll show you what has previously been marked State's Exhibit No. A and ask you what that is. A. This does have my name on it.

Q. Would you state for the record what it is? [83] A. It's a statement made by Mr. Stidham.

Q. All right, sir. Were you present when that statement was written out? A. Yes, sir.

Q. Was it written by Mr. Stidham himself, sir? A. Yes, sir.

Q. Do you recall when you first saw Mr. Stidham on the morning of the 28th of—correction, on the 27th of September, '68? Do you recall what time it was, sir, when you first saw him? A. No, sir.

Q. Do you know how long he was present in the room in which this statement was written out before you took it—before you were present before he wrote that statement? A. I don't remember, sir.

Q. Do you know how he got from this place of confinement to the place where the confession was taken? A. He was conveyed there by a Highway Patrol trooper and myself.

Q. All right, sir. Do you know where inside the penitentiary—do you recall where inside the penitentiary he was located, where you went to get him, that is, sir? A. I don't recall the cell block, no, sir.

Q. Do you recall the conditions as they existed in the cell at the time that you went by to pick him up? A. In what respect?

Q. Well, sir, the physical make-up of the cell. Was [84] there furniture in the cell, do you recall? A. Whatever— The best I can remember, whatever articles are in the cell; toilet bowl and wash basin.

Q. Was there a bed in the cell, do you recall? A. Yes, sir, a bed.

Q. Was there water on the floor of the cell when you went in to get Mr. Stidham? A. I don't recall that, sir.

Q. Did Mr. Stidham complain to you at the time that you went to get him about not having been fed or that he had no water? A. Not that I recall.

Q. Do you remember what his physical condition was when you saw him, sir? A. No, sir.

Q. Do you recall whether he had any marks of any violence on his person, sir? A. No, sir.

Q. All right. You conveyed him then from the place where he was confined to another place. Where was this other place that you took him, sir? A. That was a building on the ball diamond.

Q. All right, sir. Who all— Do you remember who was in that building? A. I can't recall everybody, no, sir.

Q. Well, will you look again at the exhibit that I handed you? You still have it in your possession. There are several signatures to that document. Do you recall if those [85] persons were present, sir? A. I recall Lt. Eitzman, Patrolman Overbeck, Patroman Billings, Trooper Caldwell and Sgt. Little of the Highway Patrol.

Q. Were you continuously in this building with Mr. Stidham from the time that you brought him in there until he wrote that statement out? A. No, sir, there was times when I stepped outside.

Q. Do you know how long a period of time? You say "times you stepped out". Do you recall how many times? A. I don't recall how many times. At that time I was afflicted with a deep cough and the weather was extremely hot. We had a fan inside this building and I would go over and stand by that fan. Then I would step outside to try to get a little air.

Q. Were you outside for long periods of time, sir, do you recall? A. The best that I can recall, I would say, five or ten minutes.

Q. Now, during the time that you observed Mr. Stidham did you see anyone physically abuse him? A. No, sir.

Q. Did you hear him threatened in any way? A. No, sir.

Q. Was he promised anything or threatened in any way to induce him to write out this statement? [86] A. I don't recall.

Q. You don't recall whether he was? A. I don't recall anybody promising him anything.

Q. Do you recall anybody threaten to do any physical violence to him? A. No, sir.

Q. Did you handcuff him when you brought him down from his cell? A. Yes, sir.

Q. Did he remain handcuffed during the course of the interrogation? A. No, sir.

Q. Did you take the handcuffs off him? A. To the best of my knowledge they were taken off.

Q. All right, sir. Did you see him—I asked you before if he had been physically abused in your presence but did you see him hung by these handcuffs off any beam in that building or room, sir? A. No, sir.

Q. Did anyone dictate this statement to the accused or did he write it out himself, sir? A. If I remember correctly, he wrote it himself. I don't recall anybody doing any dictating.

MR. KINDER: I don't have any further questions.

Cross-Examination by Mr. Hennelly

Q. Officer, the first time that you saw the defendant was in Death Row. A. I don't recall where it was, the first time I saw him.

Q. Who was with you? Was Eitzman with you? [87] A. The first time I saw him?

Q. Yes. A. I don't remember, sir.

Q. Turn to Page 544.

I want to ask you if these questions were asked—and I'm referring to Page 554 of the transcript—and ask you—by Mr. Riley—when he tried the case down in the country: (Reading): Q. Where was the first time you saw him? A. In Death Row.

Do you recall that? A. No, sir.

Q. Now, let me ask you: Who gave you the orders to bring Stidham down to the baseball field at the athletic shack? A. I don't remember who gave the orders.

Q. How far did you have to go from Death Row to the athletic shack? A. I would say quite a distance. He was transported in a car.

Q. Was it pretty much of an isolated spot? A. No, I wouldn't say it was isolated.

Q. What was the nearest building to the athletic shack that you recall now? A. One of the cell buildings.

Q. Sir? A. One of the cell buildings. I don't recall which one.

Q. Was this athletic shack a one-room building? A. I believe it was. There might have been a smaller [88] room in there, I don't recall.

Q. And I believe your testimony is that you really don't recall too much about anything that happened there, is that right? A. My testimony now?

Q. Yes. A. I recall Mr. Stidham being questioned.

Q. Yes, but you don't— Do you remember whether he was standing or sitting at the time? A. He was sitting.

Q. And do you remember who did the questioning? A. We took turns questioning.

Q. Sir? A. We took turns questioning him.

Q. Did you do some of the questioning? A. Yes.

Q. Who were the other officers that were in that room with you? A. Lt. Eitzman, Sgt. Little of the Highway Patrol, Patrolman Elmer Overbeck, Patrolman Billings and Trooper Caldwell.

Q. What kind of weapons did you have? A. We didn't have any weapons.

Q. You didn't have any weapons with you when you took him into the— A. I had my sidearm with me.

[89] Q. Do you know whether or not that athletic shack had some corkball bats anywhere in it? A. I don't recall what type of equipment it had in it.

Q. It had general athletic equipment in it though, didn't it? A. Yes.

Q. When he left the Death Row was he handcuffed? A. Any time he was moved he was handcuffed while I was there. When he was moved other times when I wasn't present I don't know what condition he was moved in.

Q. Were his hands behind him when he was handcuffed? A. If I was with him, yes, sir.

Q. Officer, do you remember that besides your sidearm you had a riot gun with you? A. I remember during the days that I was up there I had a riot gun. I don't recall if I had it at that time.

Q. Turn to Page 552. I want to ask you if this question was asked you when the case was tried and if you gave this answer. I'm quoting now from page 552 of the transcript. (Reading): Did either you or Trooper Caldwell have any shotguns with you or pistols when you went up there? A. I had a riot gun. Q. You had a riot gun? A. And my sidearms. Q. And your sidearms? A. Yes, sir.

Do you recall those questions and that answer? A. I don't recall it but if it's in that document I said it.

[90] Q. Would you say that that was a pretty hot day, officer? A. Yes, sir.

Q. Sun was shining? A. Yes, sir.

Q. And I believe you indicated that you had been in the hospital, as a matter of fact. A. Yes, sir.

Q. For some time. A. Yes, sir.

Q. So that you stepped in and out of the room for some period of time, did you? A. Yes, sir.

Q. Now, during the time that the defendant was originally questioned didn't he, as a matter of fact, deny that he had anything to do with the killing? A. I don't recall, sir.

Q. Do you know how many times prior to this particular day he had been questioned? A. No, sir.

Q. I believe your testimony is that nobody told him anything to put in that statement, is that right? A. Yes, sir.

MR. HENNELLY: I have no further questions.

MR. KINDER: No further questions.

THE COURT: You may step down.

(WITNESS EXCUSED.)

MR. KINDER: May this witness be excused, your Honor?

THE COURT: Mr. Hennelly?

[91] MR. HENNELLY: No more.

MR. KINDER: Thank you, Tom.

ELMER OBERBECK,

being sworn, testified:

Direct Examination by Mr. Kinder

Q. Would you state your name, sir? A. Elmer Oberbeck.

Q. And what is your occupation, Officer? A. Police officer.

Q. St. Louis Police Department? A. Right.

Q. How long have you been in that occupation, sir? A. In my twentieth year.

Q. Officer, were you involved in the investigation of the murder that took place at the Missouri State Penitentiary in the month of September, 1954? A. I was.

Q. Who was your immediate superior at that time, sir? A. Lt. Walter Eitzman.

Q. Do you know where Lt. Eitzman is now, sir? A. He's retired. I don't know where he would be.

Q. All right, sir. I'll show you that which has been marked State's Exhibit A and I'll ask you to take a look at that and see if you can identify that for the record. Have you ever seen that document before, sir? A. Yes, my signature is on it.

[92] Q. All right, sir. What is it and where did you see it before? A. As near as I can recall, it was in the Missouri State Penitentiary in the month of September, 1954. I believe—really, I couldn't answer where the location was where I did see it.

Q. Did you see that document written, sir? A. I did.

Q. Who wrote it? A. James Stidham.

Q. All right, sir. Were you present when he wrote it? A. I was present.

Q. Do you recall, sir, when you first saw Stidham on the day of the 27th of September, the day that confession was written, that statement was written? A. I can't recall the time. It was during the daytime.

Q. Now, did you see him before that statement was written? A. Before then? No, sir.

Q. That is, on that day, sir. A. On that day? It's hard for me to remember, fourteen years.

Q. Did you assist in interrogating Mr. Stidham? A. I was there present.

Q. Did you ask him any questions? A. Not that I recall.

Q. All right, sir. Now, do you know how long he was [93] questioned before that statement was taken? A. It wasn't very long, maybe a half an hour.

Q. All right, sir. Was he continuously in your presence during that period? Did you ever leave the room for any reason? A. No, I never left the room.

Q. All right, sir. Did you during the period of time prior to the taking of this statement, the writing of this statement, did you see anyone physically abuse Mr. Stidham? A. No, sir.

Q. Did you hear anyone threaten Mr. Stidham? A. No, sir.

Q. Did you hear anyone offer Mr. Stidham any promises or any reward in return for his writing out this statement? A. No, sir.

Q. Did someone dicate the statement to Mr. Stidham? A. No, sir.

Q. Do you recall what instruction was given to him as far as the statement was concerned? A. To write in his own handwriting the facts pertaining to what he had been involved in. He was told to put that in his own handwriting, which he did.

Q. All right, sir. Was he handcuffed when you first saw him that day? A. This I can't recall.

Q. Do you recall whether he was handcuffed or not during [94] the interrogation, sir? A. I don't believe so.

Q. Did you see anyone strike him with a corkball bat? A. No, sir.

Q. Did you see him being strung up from a rafter or beam or member in the building? A. By his hands? No, sir.

MR. KINDER: No further questions, your Honor.

Cross-Examination by Mr. Hennelly

Q. Officer, do you remember testifying in this case down in Poplar Bluff? A. I remember that, yes, sir.

Q. Do you remember—This is an unusual question but do you remember a recess in the middle of your examination? A. No, I don't.

Q. Do you recall having had any conversations with the then prosecutor Riley respecting the testimony you had given to me on cross-examination prior to the recess? Do you remember anything about that? A. No, I don't.

Q. Now, Officer, was this the first time that you had ever questioned Stidham, the time that he was questioned in the athletic field and the time the statement was taken from him? A. I was in the room present. I didn't question him that I remember.

Q. Was that the only time you were present during his [95] questioning? A. This is the only time I can actually remember.

Q. And do I understand you correctly that when he first came into the room that he denied any participation in the murder? A. I don't recall that.

Q. Four twenty-one.

I want to ask you whether or not these questions were asked by me on cross-examination down in the country and whether or not you gave these answers and I'm quoting from Page 421 of the transcript.

(Reading): Q. Officer, do I understand correctly that when the Defendant first came in, he denied any participation in the murder? A. He denied any participation in the murder? Q. Yes. A. On the first account. Q. How long did he persist in that? A. We talked to him I imagine for about twenty-five minutes or thirty minutes, right along in there, and he continued to say that he had nothing to do with the murder of Donnell up to that time.

Do you recall me asking you those questions and you giving those answers? A. I cannot recall it.

Q. Well, that was some time ago. Would you say that your memory was better then than it is now? A. At the immediate time, yes, sir.

Q. Then I believe your testimony—and I asked you the next question: (Reading): Q. And then after that, he made [96] an oral statement in which he admitted his complicity in it, is that right? An oral statement, in which he did say he had something to do with the murder? A. That is right. A. I believe he made an oral statement first.

Q. And your testimony to the Judge is that even though he stayed there for half an hour denying that he had anything to do with the murder that he—without anybody hitting him, without anybody striking him in any way, without anybody making any promises of any kind—admitted a complicity in the murder. A. This is the way it went.

Q. I see. You knew, of course, that this man had been in the penitentiary for years, didn't you? A. I knew he was a prisoner there. I didn't know how long.

Q. Were you present when that statement was written by the defendant? A. Yes, sir.

Q. Do you recall whether or not you or anyone else made any suggestions to him as to what he should put in it? A. Not no suggestions, no, sir.

Q. I'm going to ask you to look at the statement and tell me whether or not there isn't something scratched out in the statement and then a correction made on it. A. I see a word scratched out.

Q. Now, I'm going to ask you if it isn't a fact that [97] one of the officers told him they didn't want him to write what he was about to write and told him what to put in after that; do you recall that? A. No, sir, I don't.

Q. How close were you to the defendant when he was writing that statement out? A. Ten, twelve feet. It's hard to remember.

Q. Were you all sitting around a table? A. It seems like there was a table in the room.

Q. Did you leave the room at any time? A. Not that I remember.

Q. Did anybody leave the room at any time? A. Not that I remember.

Q. Was it a warm day? A. I couldn't remember that either.

Q. I want to ask you with respect to the particular room where the statement was made, this athletic shack, is that a rather isolated area? A. Oh, it's off the ball field. It was a clubhouse, if I remember right, for their—the ball diamond.

Q. It was not in the penitentiary proper? A. It was within the confines area of the penitentiary.

Q. But not within any of the administration buildings or any of the other buildings. A. It was immediately adjacent to them.

Q. Who was it that made the suggestion that perhaps [98] they better take the defendant Stidham down to the athletic shack rather than questioning him in the classification room or in any of the other rooms which were part of the complex proper? A. I never heard that.

Q. You didn't know who made the original decision to go to the athletic shack? A. Well, our decision would naturally come from the highest in command there but I never heard the remark.

Q. Wouldn't it have been any—I guess there weren't any corkball bats in the classification room or any of those places? A. Not that I remember.

Q. And the classification room and the other areas were possible to be seen and observed occasionally by people too, weren't they? A. Classification room, I don't know what you mean.

Q. Well, do you remember that there had been some interrogation of the other prisoners in the classification room? A. Well, you're naming a room I wouldn't be able to identify by the room, classification.

Q. Well, did you take part in any interrogation of any other witnesses, any other defendants? A. I did.

Q. And how many of them were questioned in the athletic [99] field—shack? A. There was numerous ones questioned in there.

Q. And did you question them in any other part of the penitentiary? A. I talked—or I was with a group that were questioning them in other parts.

Q. I presume in the course of all the time that you were there questioning all of these different defendants you never did see any officer or any member of the State

Highway Patrol or anyone in authority ever hit, kick or beat or threaten any of those people, did you? A. No, sir.

MR. HENNELLY: That is all, officer, thank you very much.

MR. KINDER: Thank you, Officer Oberbeck.

Your Honor, may this witness be excused?

THE COURT: Mr. Hennelly?

MR. HENNELLY: Yes, that is all.

(WITNESS EXCUSED.)

CHARLES BILLINGS

being previously sworn, testified:

Direct Examination by Mr. Kinder

THE COURT: You're still under oath.

Q. (By Mr. Kinder) Would you state your name, sir? A. Detective Charles Billings.

Q. And how long have you been on the St. Louis Police [100] Department, sir? A. Twenty-five years the first of November. I was off for a short time and came back.

Q. All right, sir. Were you involved in the investigation of a murder of one Walter Lee Donnell at the Missouri State Penitentiary in the month of September, 1954? A. Yes, sir, I was.

Q. Who was your immediate supervisor or superior at that time? A. Lt. Walter Eitzman.

Q. Do you know where Lt. Eitzman is now, sir? A. Sun City, Arizona.

Q. Do you know how long he's lived there? A. He retired in about February or March of this year and moved out there immediately.

Q. All right, sir. Let me show you, if I may, please, that which has been marked State's Exhibit A. I'll ask

you if you've ever seen that document before. A. Not this particular—the original I had seen.

Q. You've seen the original of that document? A. Yes, sir.

Q. That is your signature that appears there, sir? A. Yes, sir.

Q. Do you remember seeing the author of that document write it? A. Yes, sir.

[101] Q. Who was the person who wrote it, sir? A. William Stidham; James William Stidham.

Q. Do you know where physically inside the Missouri State Penitentiary this statement was written? A. In the field house, at the athletic field.

Q. All right, sir. And do you remember the persons who were present other than yourself? A. Lt. Eitzman, Sgt. Little, Trooper Caldwell, Elmer Oberbeck, Thomas Jenneman and myself.

Q. I know it's hard to ask you this question, sir, but do you happen to recall what time of day Mr. Stidham was first brought into the field house? A. No.

Q. Do you recall whether it was before or after the noon hour, sir? A. If memory serves me, I think it was after.

Q. After the noon meal? A. (Nods head.)

Q. Do you remember his physical condition at the time he arrived at the field house, sir? A. It appeared normal.

Q. Appeared normal to you, sir? Had you had occasion to see him before this date? A. Not that I can recall.

Q. All right, sir. Now, the document states that that statement was taken at 2:35 p.m. Assuming your [102] calculations, that it was shortly after the noon hour that you first saw him, did you have occasion to leave the room in which he was physically located in between noon and

2:35 p.m.? A. I could have been in and out of there several times.

Q. Do you recall whether you were gone for any protracted period of time? A. No.

Q. How long— A. I wouldn't have been gone for any long period of time.

Q. May I correct the record? I made the same mistake Sgt. Little did. It's 12:35, not 2:35, I'm talking about.

During the course of the time, sir, that you observed Mr. Stidham was he physically abused? A. No, sir.

Q. Did anyone threaten him in your presence? A. No, sir.

Q. Did anyone promise him any reward or any easy treatment if he would write out a statement in longhand? A. No, sir.

Q. Was this statement dictated to Mr. Stidham or did he write it of his own volition? A. To my recollection he wrote it of his own wording and I didn't hear anyone dictate anything to him.

Q. Did Mr. Stidham complain to you or any of the [103] officers in your presence that he was hungry or thirsty or that— A. No, sir.

Q. Did he make any complaints concerning his living conditions? A. No.— May I retract that? I do recall someone had complained about the food not being too good at the penitentiary but not any particular instance.

MR. KINDER: I see. I don't believe I have any further questions.

Cross-Examination by Mr. Hennelly

Q. Officer Billings, at the time of this incident, and presently, you were of course aware of certain rules which the Police Department and certain police manual rules, federal, civil rights section, and so on, which really forbade

anyone from hitting or beating a witness, wasn't there? A. That's true; yes, sir.

Q. And this was well known to all the officers, wasn't it? A. That's correct.

Q. Now, on the day in question had you been a party to any prior interrogation of Stidham? A. No, sir, not—I don't think I had seen him at all before that.

Q. Do you know who had previously questioned him? A. No, sir, I don't.

Q. How many days after the riot did he sign this statement? [104] A. Four, three or four days, I guess, I don't recall.

Q. Were you aware, aren't you, of the fact that he had been questioned in the interim? A. We talked to him. I was aware that—possibly that somebody had, I wouldn't know who.

Q. Now, did— When he went down to this athletic shack were you already inside the shack or did you come in after he was there? A. I don't recall. I might have been or I might have come down with him.

Q. Can you give us any idea of the dimensions of this room? A. Well, as I can recall, we were in a large room and there was a divided building. Part of it was fenced off as an equipment center. Where we were was evidently a type of recreation room.

Q. When you say "equipment" you mean bats and things like that? A. I don't know what was in there. It was locked.

Q. Well, do you recall me asking you about whether or not there were any bats there, and when I say "bats" I don't mean birds, when we tried the case, do you? A. No, sir, I don't.

Q. Page 563 of the transcript. I'm going to ask if I [105] didn't ask this question and if you didn't give this answer down in the country.

(Reading): Q. Were there any sticks in that building which could be used for cork ball games, did you see any of those around there? A. There were bats in the place. Q. Bats? A. There was the sporting, sports office. Q. Did anybody take any of those bats, or any of that sporting equipment and make use, fool around with it in front of Stidham? A. No, sir.

Now, do you recall those questions being asked you and you giving those answers? A. I must have given those answers.

Q. Now, I want to ask you how long was he questioned orally before anything was put on paper? A. I have no way of recalling how long it was.

Q. Well, I want to ask you, on Page 564, if this question was asked—these questions were asked and these answers given by you.

(Reading): When Stidham was first questioned, did he deny having anything at all to do with the death of Walter Lee Donnell? A. When he was first questioned. Q. How long did he persist in that position Officer? A. Oh, about twenty to twenty-five minutes.

Do you recall those questions being asked and that answer being given? [106] A. I don't actually recall it but it must be if the transcript of the trial—those would be the answers that I gave to the questions.

Q. And your testimony is that at that point, after the twenty-five minutes, he wasn't lifted up, suspended from the rafters of the athletic building in an isolated area away from the administration building, hit with the corkball bats and then said that he would make the signed statement for you; that did not happen, did it? A. No, sir.

Q. Do you remember with respect to the statement, did anybody tell the defendant anything to put in there? A. Not that I can recall.

Q. Had there been any conversations between the defendant and any of his interrogators with respect to anything at all to put in there? A. No.

Q. Not even the method or manner in which it would be written? He just wrote it of his own free will, made a complete— A. I don't recall he was told how to put anything in there.

MR. HENNELLY: I have no further questions.

MR. KINDER: I have no further questions.

THE COURT: You may step down.

(WITNESS EXCUSED.)

MR. KINDER: I'd like to call Mr. Hennelly.

[107] THE COURT: This perhaps ought to be in the record. There's a tenet of the legal ethics that says it's improper for a lawyer to testify in a case where he's prosecuting or defending it. This isn't before a jury and I don't anticipate that we'd have any difficulty on this score but I do want to bring it to your attention that there is such a thing. Now it's true you're being called as a witness for the adverse side and you're not attempting to testify in your own part of the case but is there any objection on anybody's part?

MR. HENNELLY: No objection. My understanding is that the prosecutor is calling me on what is strictly the proper interest of the administration of justice with respect to part of the motion. I have no objection about it at all.

THE COURT: All right.

MARK HENNELLY,

being sworn, testified:

Direct Examination by Mr. Kinder

Q. Mr. Hennelly, you were the court-appointed attorney for the defendant then, now the movant, for James William Stidham in the case of the State versus Stidham, were you not? A. Yes, I was.

Q. Now, Mr. Hennelly, did you at that time have associated with you in the practice of law a gentleman by the name of F. Neil Aschemeyer? A. Yes, I did.

Q. What was your business relationship with him at [108] that time, sir? A. Well, he was associated with me in the business. He tried some cases for me. He assisted me in the writing of several briefs after the drawing up of certain motions. That was—

Q. Had you ever prior to the 3rd day of October, 1955 discussed the particulars of the Stidham case with Mr. Aschemeyer? A. Yes, I did.

Q. And was he generally familiar with the case and the facts, sir? A. Yes, I think he assisted me too in writing up a motion for a new trial, either he or Sidney Glaser (sic) did.

Q. Now, the court records reflect, sir, that Mr. Aschemeyer appeared in the Circuit Court of Butler County on the 3rd of October, 1955 and presented the motion for a new trial and was present with Mr. Stidham at the time of his sentencing. For the Court's edification, this is found on Page 775 of the transcript, and 776. Was this done so at your request, sir? A. Yes.

Q. And had you discussed this matter with Mr. Stidham prior to— A. No, I had not. I was— I thought that I was going to be free on that occasion but I was in the trial of another lawsuit so I employed—at my expense I sent him down there for the purposes of the sentencing.

[109] MR. KINDER: I don't believe I have any further questions.

MR. HENNELLY: Your Honor, in view of the State's testimony I want to recall the defendant.

DEFENDANT'S REBUTTAL EVIDENCE:

JAMES WILLIAM STIDHAM,

being previously sworn, testified:

Direct Examination by Mr. Hennelly

Q. Mr. Stidham, I want to hand you what has been introduced into evidence as State's Exhibit A and I'll ask you whether or not you recognize the photostat of it that you have in your hand. A. Yes, sir.

Q. Tell his Honor the circumstances under which that was written. A. After I had been hung up by the hands and beaten, as I described a short while ago, I agreed to write this statement they would dictate to me.

Q. Now, I wanted to ask you: Look at the statement, Mr. Stidham, and tell me what does the statement say with respect to your age? A. It says I'm twenty-five years of age.

Q. Now, on the date in question, in truth and in fact, how old were you? A. I was twenty-eight.

Q. Twenty-eight years. Did the officer who dictated the statement to you tell you to put down twenty-five? A. Yes, sir.

[110] Q. Did he have in front of him certain records from the penitentiary? A. Yes, sir.

Q. I want you to look and tell his Honor what it says with respect to any prior convictions that you have. A. It says three prior convictions for Dyer.

Q. And in truth and in fact how many prior convictions did you have on that occasion? A. Actually, I had two but one of them was nullified.

Q. So you really only had one. A. Yes, sir.

Q. But, in any event, you did not have three. A. No, sir.

Q. Can you tell his Honor the circumstances under which you wrote three prior convictions for the Dyer Act? A. I was directed to.

Q. Sir? A. I was directed to by the interrogating officer.

Q. Did the same officer that had certain records in front of him— A. Yes, sir.

Q. Now, I want you to look at the exhibit and see if you can find the spot where there is something scratched out. A. Yes, sir.

Q. Tell his Honor the circumstances under which that was scratched out. A. Well, to the best of my memory, one of the officers [111] told me to put something there and I started to put it there and another one—which I think was Lt. Eitzman—he directed me to put another sentence in there.

Q. So you scratched it out. A. Yes, sir.

Q. Now, did— At any of your interrogations did any of the officers tell you that you could have a lawyer if you wanted one? A. No, sir.

Q. Did any of them get you a lawyer? A. No, sir.

Q. Did they tell you at the time of your arraignment, the second arraignment on the Indictment—that it could be held up until such time that you could confer with your lawyer? A. No, sir.

Q. Did anyone advise you of any constitutional rights at the time of any of these interrogations? A. No, sir, nobody did.

Q. Did anyone tell you at the time that Exhibit A was arranged that you didn't have to make any statement of any kind? A. No, sir, they always insisted that I had to make one.

Q. I see. A. Can I offer something?

Q. Sir? A. Can I offer something? This also says I'm from Kansas City, Missouri, this statement does. I have never lived in Kansas City, Missouri, not one [112] day.

Q. Can you tell his Honor the circumstances under which that was in there? A. I was ordered to put that in there.

Q. Sir? A. I was ordered to put it in there.

Q. Is there any truth in the statement? A. No, sir.

Q. I'm talking about— A. To my knowledge, I don't know anything about the facts of the crime, you know, other than what I was told, that—this interrogation here, told what to put in. I have never touched Donnell. I've never, say, been within a foot or two or three foot of Donnell. I've never even spoke to the man. In fact, I'm just as innocent of this crime as you or anybody else in this courtroom.

MR. HENNELLY: I have no further questions.

MR. KINDER: No further questions.

MR. HENNELLY: Does the Court have any questions of the defendant, your Honor?

THE COURT: You may step down.

(WITNESS EXCUSED.)

MR. HENNELLY: We also wanted to read something from the transcript.

Your Honor, on behalf of the defendant I wanted to [113] put into evidence particularly Page 418 of the transcript in which Major Eitzman, in answer to a question on redirect examination by Mr. Riley, said the following:

From the bottom of Page 417. (Reading): Did you tell him what to put in that statement regarding the facts of the killing of Donnell? A. Not what to put in. I

told him what we desired as far as the facts were concerned, around the incident of the crime.

Then, in all fairness, he said: (Reading): Q. But it was, the use of the words in the statement were his own and not yours? A. Exactly.

Is there a part of this transcript a picture of his cell?

MR. KINDER: I do not— The only exhibit I have, Mr. Hennelly and your Honor, are these which are attached to—and this is of the murder weapon itself, and some correspondence.

I assume that those photographs are with the file in the Supreme Court, your Honor, because I do not have copies of them. I have some photographs but they're not marked so I have no way of telling.

MR. HENNELLY: Is there any access that the Court has to those photographs?

THE COURT: Have either of you called upon the Supreme Court to see if you could see these photographs?

[114] MR. KINDER: I have not but I can, your Honor. I'm sure that they'll let me have access to them, to have whichever ones you want duplicated, Mr. Hennelly.

MR. HENNELLY: Well, could I ask the Court then to—if counsel could and if there's any expense we'd be happy to pay it—for a photograph of Mr. Stidham's cell? (To defendant): Is that what it was?

MR. STIDHAM: Yes, sir.

MR. KINDER: I'll attempt to obtain all of the photographs so the Court can have those with the exhibits with the transcript here.

THE COURT: All right.

MR. KINDER: Now, as I understand it, your Honor, this transcript is a part of the official court file, this transcript?

THE COURT: Yes.

MR. KINDER: And, if I may, I ask the Court to take notice of the whole transcript but in particular I'd like to call the Court to several pages which I think call for some special attention, if I may.

I would like the Court to specifically observe Page 486, 487 wherein the procedure used by the trial court in determining the voluntariness of the confession outside of the hearing of the jury was as set forth in detail.

THE COURT: That's Page 486 and 487?

[115] MR. KINDER: Four eighty-six and four eighty-seven, your Honor.

I would like also the Court to observe, and I'm sure the Court will read the whole transcript—but Page 775 and 776 in regard to the matters concerning Mr. F. Neil Aschemeyer and his presence at the time of sentencing of Mr. Stidham.

That's all I have, your Honor.

MR. HENNELLY: That's all we have, your Honor.

I would presume that the Court will want this matter briefed by counsel?

THE COURT: Extensively.

MR. HENNELLY: And I would— The defendant has requested me to ask the Court whether or not it would be possible for him to remain in the City Jail until such time as the Court makes a ruling?

THE COURT: Oh, no, that would not be possible. I would anticipate it would take some time. I'd have to read the transcript of this case. I have to— First of all you have to prepare a brief.

MR. HENNELLY: That's right, your Honor.

THE COURT: The State will have to prepare a brief and you will have the right to answer.

MR. HENNELLY: Yes, your Honor.

MR. KINDER: It's the other way around.

[116] MR. HENNELLY: I'll prepare the first brief.

THE COURT: He has the right to file the first brief, then you file a brief, then he files an answering brief. This would comprehend a matter of three or four months, Mr. Hennelly; no, that motion is overruled.

Very well.

MR. HENNELLY: Well now, with respect to the Court's wishes with respect to the brief, the timing. When will the Court want the movant's brief, your Honor? I'll have to inquire as to Mr. Hesse's schedule.

THE COURT: I don't want to press you too much on it but when can—do you feel you can prepare this brief?

MR. HENNELLY: A minimum of thirty days, your Honor.

THE COURT: All right, you'll have thirty days to file your original brief. How about the State?

MR. KINDER: I'd ask for thirty days after I receive the brief, if I may, your Honor.

THE COURT: That's all right.

MR. HENNELLY: Fine.

THE COURT: And then you'll want time to file—

MR. HENNELLY: Fifteen.

THE COURT: Fifteen days to file an answering brief.

MR. HENNELLY: Right.

THE COURT: All right. Incorporate that in your Court memorandum here.

[117] MR. HENNELLY: Very well, your Honor.

I might say, for the purposes of the record, that the defendant has indicated to me that if the Court saw fit to make a finding which would necessitate any further findings in this record that he is perfectly willing for this Court to make those findings or for this Court to do whatever is necessary to completely take the matter to a conclusion. I say that only in an advisory way and I say that without regard to what the rules are or anything else but the de-

fendant wanted me to tell the Court that; isn't that right, Mr. Stidham?

MR. STIDHAM: Yes.

THE COURT: All right.

Well now, do I understand there is no further evidence to come before the Court either documentary or oral evidence in this cause?

MR. HENNELLY: That is right, your Honor.

MR. KINDER: That is right, your Honor.

THE COURT: And the only testimony—the only evidence in this cause has been the sworn testimony and the exhibits admitted into evidence here this day in this courtroom?

MR. HENNELLY: Your Honor, there is another bit of stipulation which Mr. Stidham and Mr. Hesse and Mr. Kinder and I entered into in Jefferson City which is presently unavailable [118] only for the reason that the court reporter is inaccessible. This has to do with the attempt on the part of Mr. and Mrs. Stidham to visit the defendant.

MR. KINDER: Well, the matters which we stipulated to, your Honor, were matters—were agreements with the defendant which would save time, matters which we have no conflict about, his parents not being able to see him and certain items and matters which are matters of record outside the official records of this court, so—

THE COURT: That's to be taken into consideration in this hearing, this evidence; is that right, that stipulation?

MR. HENNELLY: Yes.

MR. KINDER: Yes.

Also, I forgot to offer into evidence Exhibit A but I think it's surplusage because it is a record of this Court.

MR. HENNELLY: Mr. Stidham raises another question.

MR. KINDER: May I present those to the Court?

THE COURT: The whole transcript?

MR. KINDER: Yes.

MR. HENNELLY: Mr. Stidham raises another question, that—

MR. KINDER: You talking about the other photographs?

MR. HENNELLY: Yes.

[119] MR. KINDER: I'll make an attempt to provide those for the Court because they're lacking in this file.

THE COURT: How many will you provide?

MR. KINDER: I don't—

MR. NOLAN: There are eleven offered and accepted. I show it eleven indexed, eleven photographs.

MR. KINDER: Which were offered into evidence.

MR. HENNELLY: Mr. Stidham now raises the question about the fact that there were some other exhibits which were— Well, in any event, may we prevail upon Mr. Kinder to get photostats of either the—another picture or not, some photostats of all of the exhibits because really this exhibit is not a complete exhibit because it doesn't include everything that was introduced.

THE COURT: Well, then it might be well to get photographs, duplicates, of all exhibits submitted in the trial of this case.

MR. KINDER: I believe the problem is they went on up with the transcript on appeal and evidently are retained by the Court and I'll make every attempt to provide them for the Court, your Honor.

THE COURT: This cause will be taken as submitted. Prepare the memorandum.

Thereafter, and on the 14th day of April, 1969, [120] Memorandum Opinion of Court, Including Findings of Fact and Conclusions of Law as to Defendant's Amended Mo-

tion to Set Aside His Conviction Under Supreme Court Rule 27.26 was filed, as follows: (Caption and signature omitted)

MEMORANDUM OPINION OF COURT, INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO DEFENDANT'S AMENDED MOTION TO SET ASIDE HIS CONVICTION UNDER SUPREME COURT RULE 27.26

"Under Supreme Court Rule 27.26 (1) this court is required to make findings of fact and conclusions of law on all issues presented on the movant's Amended Motion. As Rule 27.26 (a) provides that proceedings under this Rule is civil in nature and that procedure is to be governed by the Rules of Civil Procedure, resort may be had to Rule 73.01 (b) which allows the preparation and filing of an opinion containing findings of fact and conclusions of law. This being so the grounds presented in the Amended Motion will be considered and findings and authorities as to the facts and law will be made as applied to each point raised, rather than utilization of the procedure of making findings of fact first followed by conclusions of law.

"The Court finds that the movant, while serving a twenty-five year sentence in the Missouri State penitentiary, for robbery, was involved in the prison riot at said institution on September 22, 1954, wherein events participated in by movant, and others, culminated in the violent and unlawful [121] death of one Walter Lee Donnell, a prison inmate. The movant was tried and convicted of the charge of first-degree murder of said deceased in July, 1955, in the Circuit Court of Butler County, Missouri and was sentenced to life imprisonment. This conviction was ap-

pealed to the Supreme Court of Missouri (State vs. Stidham, Mo., 305 SW 2nd 7) and was affirmed by that Court. Thereafter the movant on March 9, 1964, filed a Motion to Vacate and set aside his sentence under Supreme Court Rule 27.26 in the Circuit Court of Butler County, Missouri, and the Motion to Vacate was denied without an evidentiary hearing being afforded. An appeal followed and the Supreme Court of Missouri affirmed the trial Court's judgment. State vs. Stidham, Mo., 403 SW 2nd 616. Thereafter movant filed a second motion under Rule 27.26, and an evidentiary hearing again was denied. On appeal the Supreme Court of Missouri reversed and remanded for purposes of an evidentiary hearing in compliance with Rule 27.26. State vs. Stidham, Mo., 415 SW 2nd 297. Thereafter the movant, by change of venue, lodged and filed his motion under said rule in the St. Louis City Circuit Court on September 3, 1968. On September 27, 1968, a pre-trial conference was held in Division No. 20 of said Court, wherein the parties were represented by attorneys. An amended motion was filed by movant thereafter. On December 5, 1968, an evidentiary hearing was held in said Court wherein movant was present and was [122] represented by his attorney Mark Hennelly and the State represented by Byron Kinder, Prosecuting Attorney for Cole County. In addition to the appearance of witnesses, stipulation of facts were entered into and offered and received in evidence. Recitation of facts adduced at this hearing will hereinafter be set out in these findings where relevant and appropriate to subject under discussion.

"A review of the scope and law under this Rule follows: A motion under Rule 27.26 will not reach trial errors and same will not be considered under the provisions of said rule. State vs. Macon, Mo., 403 SW 2nd 630. Nor may a

Motion to Vacate under this rule be used as substitute for appeal or as motion for new trial or as a second appeal. State vs. Statler, Mo., 383 SW 2nd 534; State vs. Durham, Mo., 416 SW 2nd 79. The relief available under this rule is coextensive with, and no broader than, that obtainable by habeas corpus. State vs. Turner, Mo., 353 SW 2nd 602. The burden is upon movant in motion under Rule 27.26 to establish facts which would entitle him to relief. State vs. Brizendine, 433 SW 2nd 321.

"Moving now to the points set forth and relied on by movant in his Amended Motion, movant in Appendix A attached to his motion, paragraph 1, contends a) that the trial court's procedure for determination of voluntariness of the confession admitted into evidence on the trial did not comport [123] with minimum standards of due process of law in that no specific finding of voluntariness was made by the judge prior to submitting the issue to the jury and b) the overwhelming evidence was that the statement was involuntary because of coercion exerted on movant.

"Concerning subparagraph A, the record shows, and this Court finds, that prior to admission of movant's confession into evidence, the Court excused the jury and proceeded to hear sworn testimony, outside the presence and hearing of the jury, touching and bearing upon the voluntariness of the alleged confession. There was voluminous testimony heard and many witnesses sworn, the movant being afforded ample opportunity to present whatever evidence he had on this issue. The evidence adduced was highly conflicting and divergent. At the conclusion of this hearing at Page 486 of the record the following oc-

curred: "The Court: 16 and 16-1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the jury, subject of course to any attacks as to its credibility by the defendant. The defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the jury, that the statement is and should be admissible in evidence. . ."

"MR. HENNELLY: *In other words, the Court is overruling my motion, and request of the Court to hold as a matter of law, that those statements were involuntary is that right*?

"THE COURT: *THAT IS RIGHT. Mr. Sheriff will you bring the jury back in*?" (Emphasis added.)

"Movant's contention that the trial court failed to find specifically that the confession was voluntary this Court finds is untenable since the Court found specifically that the confession was not involuntary. Webster's New Collegiate Dictionary, 1961, defines "involuntary" as "not voluntary", "not done, given, etc., willingly by choice, or by act of the will. . ." Under the law of this State the Court followed the correct procedure in determining the issue of voluntariness of the confession and specifically made a finding relative thereto and this Court now so finds that the correct procedure was utilized. State vs. Glenn, Mo., 429 SW 2nd 225 (29); State vs. Aston, Mo., 412 SW 2nd 175 (19); *State vs. Washington*, Mo., 339 SW 2nd 109 (12). In State vs. Stidham, Mo., 305 SW 2nd 7, this issue on voluntariness was presented on appeal of the conviction and the decision on the question was adverse to movant. Thus the matter the Court finds is no longer

viable and litigable. State vs. Statler, Mo., 383 SW 2nd 534 (8, 9); Crawford vs. State, Mo., 436 SW 2nd 633.

"As to subparagraph b concerning the averment that [125] "the overwhelming evidence was that the statement was involuntary because of coercion exerted on movant", this contention was raised and profusely litigated in State vs. Stidham, supra, and the Court finds is no longer open to question here. State vs. Statler, supra; Crawford vs. State, supra.

"It should be noted that the evidence concerning the issue of voluntariness was greatly conflicting and was to be resolved by the trial court in the first instance and the jury in the second having regard to the credibility of the witnesses. This issue should now be considered closed, and this Court finds it to be so.

"Next movant contends that he was denied assistance of counsel at critical stages of his proceeding, listing them (a) through (d) in his amended motion. The record shows and this Court finds that while movant was an inmate in the penitentiary a prison riot began on September 22, 1954, and on September 27, 1954, after questioning by authorities, the movant confessed to his part in the murder of Walter Lee Donnell. Thereafter he was arraigned on September 29, 1954, and counsel was first appointed for him on November 23, 1954. He stood trial in July, 1955, on the murder charge. The movant claims he was entitled to counsel the day after the prison riot, and at each stage thereafter.

"The Court finds that is no merit to the contention that movant was entitled to counsel the day after the [126] penitentiary riot. In State vs. Edwards, Mo., 435 SW 2nd 1, it was held that Escobedo and Miranda did not apply to

first-degree murder trial in December, 1965. Also see State vs. Holland, Mo., 412 SW 2nd 184 (4). The Court finds that movant was not denied assistance of counsel at any critical stage in the proceedings against him.

"The same finding applies to the contention regarding his interrogations by State authorities. State vs. Gray, Mo., 432 SW 2nd 593 (5, 6); State vs. Chernick, 303 SW 2nd 595. Since movant pleaded not guilty at the arraignment, even though he requested advice of counsel, the Court finds that none of his constitutional rights were infringed upon by failure of the Court to appoint counsel. State vs. Donnell, 430 SW 2nd 297, (3, 12, 14); State vs. Brizendine, Mo., 433 SW 2nd 321 (7). The Court finds that the failure to appoint counsel for movant did not impair any of his constitutional rights in any respect. The record shows that Mr. Mark Hennelly, after his appointment as movant's attorney on November 23, 1954, ably and sedulously represented movant both in pre-trial matters and on the actual trial. The Court finds that ample time was afforded movant's attorney to investigate the facts of the case and to prepare for trial and to counsel with and advise movant. Movant's contention that an attorney would have seen bruise marks on his body is not persuasive. The record shows that Mr. F. Neil Aschmeyer, an associate of Mr. [127] Mark Hennelly, was present when allocution and sentencing took place, no objection being raised by movant to this procedure and thus movant was represented at the sentencing. The Court finds that nowhere in the record does it appear that movant was deprived of his constitutional rights to counsel, nor that movant was in any wise prejudiced by failure to appoint counsel sooner.

"Next movant contends that the State used perjured testimony in the trial, and further that evidence was suppressed concerning promises made for State's evidence. The record is barren of facts to support such allegations and the Court finds that same are without merit. State vs. Garton, Mo., 396 SW 2nd 581; State vs. Thompson, 396 SW 2nd 697; State vs. Stidham, Mo., 402 SW 2nd 616; State vs. Engberg, Mo., 391 SW 2nd 868 (6, 7).

"Next, movant's contention that because of circumstances under which his confession was made and used he was compelled to be a witness against himself is without merit. Movant could either take the witness stand to testify in his own behalf or not as he saw fit, and no prejudice against him is demonstrated in the record under this assignment, and the Court so finds. State vs. Stidham, Mo., 305 SW 2nd 7.

"Movant next contends that his constitutional rights under Miranda vs. Arizona were violated in various respects, however, the Court finds that Miranda does not apply retrospectively. [128] State vs. Gray, Mo., 432 SW 2nd 593. This case was tried long before Miranda vs. Arizona was decided.

"Movant's next assignment of error in Paragraph 6, A and B of amended motion, concerning the trial court's submission of the crime of conspiracy included in the instructions numbered 4 and 5 when not included in the indictment the Court finds is without merit. State vs. Stidham, Mo., 305 SW 2nd 15, 16; State vs. Spica, Mo., 389 SW 2nd 35, 40; as is the contention that movant was not adequately advised of the nature and cause of the accusa-

tion. State vs. Smith, Mo., 411 SW 2nd 208 (7); Crawford vs. State, supra.

"Movant next attacks instruction number 6 on the voluntariness of the confession in Paragraph 7 of his motion, stating it shifted the burden of proof to movant and failed to take into account "mental duress" as well as physical coercion. This instruction was approved in State vs. Stidham, 305 SW 2nd 7, and discussed in State vs. Williams, Mo., 369 SW 2nd 408, wherein the Court there said that the facts in Stidham were different from those in Williams. In State vs. Glenn, Mo., 429 SW 2nd 225, 237, the Court held that while the instruciton on voluntariness did not take into account the "defendant's physical condition and his sentience or awareness at the time of making any statement" it was not error for failure to refer to defendant's physical condition. In State vs. Pughe, Mo., 403 SW 2nd 635, the Court held that [129] voluntariness of a confession is a collateral issue and an instruction on this subject is not required as a part of the law of the case. The Court at Page 641 pointed out that if there is conflicting evidence before the jury concerning the voluntariness of a confession, the defendant upon request, would be entitled to an appropriate instruction on the issue of voluntariness. The Court finds this right was not availed of by movant. In State vs. Smith, Mo., 411 SW 2nd 208, the Court held that allegations of error relating to instructions to jury, being allegations of trial errors only, will not be considered on motion to vacate judgment and sentence under Rule 27.26. The Court finds that this assignment is without merit.

"In determining whether movant's constitutional rights were infringed upon by the State in securing the

confession used in this case, the totality of the circumstances must be taken into consideration, and under conflicting evidence, this question was one for the trial court and the jury. State vs. Hester, Mo., 425 SW 2nd 110; Crawford vs. State, supra.

"Having considered and disposed of all the points raised in movant's amended motion to vacate under Rule 27.26, and having discussed both the facts as they relate to the assignments of error and the law involved herein, the Amended Motion under said Rule now is overruled."

[130] (Filed—April 14, 1969.)

COURT MEMORANDUM

Thereafter, and on the 14th day of April, 1969, the Court entered the following Memorandum and Order: (Caption and signature omitted)

"Defendant-Movant's Motion to Set Aside Judgment and Sentence Under Supreme Court Rule 27.26 is overruled. Memorandum Opinion of Court, Including Findings of Fact and Conclusions of Law as to Defendant-Movant's Motion is attached herewith."

(Filed—April 14, 1969.)

MOTION TO APPEAL AS A POOR PERSON AND FOR AN ORDER REQUIRING THE COURT REPORTER TO PREPARE THE TRANSCRIPT OF THE EVIDENTIARY HEARING WITHOUT COST TO MOVANT.

Thereafter, and on the 23rd day of April, 1969, Motion To Appeal as a Poor Person And For An Order Requiring the Court Reporter To Prepare The Transcript Of The Evidentiary Hearing Without Cost To Movant was filed, as follows: (Caption and Signature omitted)

"Comes now MARK M. HENNELLY, attorney for the above named movant, JAMES WILLIAM STIDHAM, pursuant to Sup. Ct. Rule 27.26 and states to this Honorable Court that movant is an indigent and a poor person within the meaning of the law and that he does not have funds wherewith to perfect his [131] appeal.

"Your movant further states that he has no money to pay attorney fees or court costs.

"Your movant further states that he is in the custody of the authorities of the Missouri State Penitentiary.

"WHEREFORE, your movant prays this Honorable Court to grant him an order allowing him to appeal as a poor person and for an order directing the official court reporter to prepare the transcript of the evidentiary hearing for appellate review without cost to movant."

(Filed—April 23, 1969.)

DEFENDANT-MOVANT'S MOTION TO APPEAL AS A POOR PERSON AND FOR AN ORDER REQUIRING THE COURT REPORTER TO PREPARE THE TRANSCRIPT OF THE EVIDENTIARY HEARING WITHOUT COST TO MOVANT GRANTED.

Thereafter, and on the 23rd day of April, 1969, the Court entered Memorandum and Order as follows: (Caption and signature omitted)

"Defendant-Movant's motion to appeal as a poor person and for an order requiring the court reporter to prepare the transcript of the evidentiary hearing without cost to movant."

(Filed—April 23, 1969.)

MOVANT'S MOTION FOR A REHEARING

[132] Thereafter, and on the 23rd day of April, 1969, Movant's Motion For a Rehearing was filed, as follows: (Caption and signature omitted)

"Comes now movant, JAMES WILLIAM STIDHAM, and moves the Court to enter its order granting him a new hearing on all issues and as grounds therefor states:

"1. The Court's ruling is contrary to the law and the evidence.

"2. The Court committed prejudicial error in not holding that the procedure used for determining the voluntariness of the confession was unconstitutional.

"3. The Court committed prejudicial error in not holding that the confession admitted into evidence was involuntary.

"4. The Court committed prejudicial error in not holding that the trial court failed to make timely appointment of counsel.

"5. The Court committed prejudicial error in not holding that the trial court failed to properly instruct the jury on the constitutional standards to be used in making their determination as to the voluntariness of the confession.

"6. The Court committed prejudicial error in not holding that the state was allowed to prove and the jury was instructed to consider a crime not included in the [133] indictment.

"7. The Court committed prejudicial error in not holding that the state knowingly and deliberately used perjured testimony."

(Filed—April 23, 1969.)

DEFENDANT-MOVANT'S MOTION FOR A NEW HEARING OVERRULED.

Thereafter, and on the 23rd day of April, 1969, the Court entered Memorandum and Order, as follows: (Caption and signature omitted)

"Defendant-Movant's motion for a new hearing is overruled."

(Filed—April 23, 1969.)

NOTICE OF APPEAL

Thereafter, and on the 23rd day of April, 1969, Notice of Appeal was filed, as follows: (Caption and signature omitted)

"NOTICE is hereby given that the defendant, JAMES WILLIAM STIDHAM, hereby appeals to the Supreme Court of Missouri under Sup. Ct. Rule 27.26 from the judgment overruling his motion under Sup. Ct. Rule 27.26 entered against him in this court in this cause on the 14th day of April, 1969.

"Appealing as a poor person.

"On this 23rd day of April, 1969, I duly filed the [134] within notice in the records of this court and on April 23rd, 1969 served a copy thereof upon the Circuit Attorney and mailed additional copies as follows:

"Hon. Marion C. Spicer, Clerk.

"Hon. John C. Danforth, Atty. General."

(Filed—April 23, 1969.)

TRANSCRIPT ON APPEAL APPROVED

We, the undersigned, approve the above and foregoing Transcript of the record on appeal, and agree that the same may be signed, filed and made a part of the record in said cause.

/s/ Mark M. Hennelly
Attorney for Movant
/s/ Byron L. Kinder
Attorney for Respondent

COST OF PREPARING TRANSCRIPT OF RECORD

Original, 138 pages (including index) @ $.45 per page	$ 62.10
2 carbon copies, 135 pages each (including index) @ $.15 per page	41.40
TOTAL	$103.50

[135] CERTIFICATE OF COURT REPORTER

The undersigned, Melba A. Bassler, hereby certifies that she was the Official Court Reporter of Division No. Twenty of the Circuit Court for Criminal Causes of St. Louis, Missouri, at the time the above cause was tried, and that the cost of preparing the Transcript on Appeal is as set forth above, and that defendant's attorney was furnished copy of this Transcript on Appeal free of charge.

/s/ Melba A. Bassler
Official Court Reporter, CSR,
Div. 20, Circuit Court for
Criminal Causes, St. Louis,
Missouri.

APPENDIX D—Opinion in: State v. Stidham, No. 45537

STATE of Missouri, Respondent

v.

James William STIDHAM, Appellant.

No. 45537

Supreme Court of Missouri,
Division No. 2.
Sept. 9, 1957.

Prosecution resulting in conviction of first degree murder arising out of a prison riot and based on a theory of conspiracy. The Circuit Court of Butler County, Randolph Weber, J., entered judgment of conviction and defendant appealed. The Supreme Court, Bohling, C., held that instruction concerning conspiracy using the words, "aid, abet, assist or encourage" in the disjunctive rather than conjunctively, was proper and did not erroneously authorize a conviction upon a finding that defendant did any one of the four acts.

Judgment affirmed.

1. Criminal Law (Key) 736(2)

In prosecution resulting in a conviction of first degree murder, question concerning the voluntariness of defendant's confession was for jury.

2. Homicide (Key) 308(3), 309(5)

In prosecution resulting in conviction of first degree murder, under defense of alibi the only submissible issue of guilt under evidence was murder in first degree, and therefore the trial court did not err in failing to instruct on murder in the second degree and manslaughter. Section 559.010 RSMo 1949, V.A.M.S.

3. Criminal Law (Key) 437

In prosecution resulting in conviction of first degree murder arising out of prison riot, diagram of floor plan of prison basement, which showed location of cells, steel gates and which was drawn to scale and which was identified by the person making it as well as others was admissible. Section 559.010 RSMo 1949, V.A.M.S.

4. Criminal Law (Key) 404(4)

In prosecution resulting in conviction of first degree murder arising out of a prison riot, 16-pound sledge hammer found at side of victim's body the night of riot was admissible. Section 559.010 RSMo 1949, V.A.M.S.

5. Criminal Law (Key) 1169(5)

In prosecution resulting in conviction of first degree murder arising out of a prison riot, court's instruction to witness not to testify to any statements made by others and conveyed to defendant by the witness cured any alleged error of police officer attempting to explain to defendant that officer had a statement from others.

6. Criminal Law (Key) 432

In prosecution resulting in conviction of first degree murder, trial court properly refused exhibits allegedly relating to fact that a witness was of unsound mind and incompetent since the sources of information and the method and time of preparation of exhibits were not such as to justify exhibits' admission. Sections 490.680, 559.010 RSMo 1949, V.A.M.S.

7. Witnesses (Key) 79(3)

It is court's function, not the function of jury, to pass on competency of a witness. Section 491.060 RSMo 1949, V.A.M.S.

8. Witnesses (Key) 330(3)

Trial courts may exercise a sound discretion as to the extent of the examination of witnesses with respect to specific acts on collateral matters affecting their credibility and not directly connected with the issues on trial.

9. Criminal Law (Key) 1136

Where defendant's counsel did not avail himself of court's offer to recall witness, defendant could not assert error in that he had been unable to cross-examine a witness completely in respect desired.

10. Homicide (Key) 308(1)

In prosecution resulting in conviction of first degree murder, instruction properly required jury to find that the conspirators willfully killed victim.

11. Criminal Law (Key) 755½, 761(11), 811(3)

Where defense to murder prosecution was alibi and there was no contention or evidence that the victim had not been murdered, use of the words "kill and murder" and "killing and murdering" and their repetition several times in an instruction did not constitute comment on evidence or single out and give undue prominence to such words and did not assume a murder had been committed.

12. Homicide (Key) 305

In prosecution resulting in conviction of defendant of murder in the first degree based on theory defendant had conspired with others to kill victim during prison riot, under statute that principals in second degree in the commission of any felony or accessories to any murder or other felony before the fact may be charged, tried, convicted and punished in same manner, as the principal in the first de-

gree, use of words "aid, abet, assist or encourage" in instruction concerning conspiracy disjunctively rather than conjunctively did not erroneously authorize conviction upon the finding that defendant did any one of the four acts. Sections 556.120, 556.170, 559.010 RSMo 1949, V.A.M.S.

13. Criminal Law (Key) 64

With respect to convictions of principals in second degree, in absence of statutory provisions, no particular acts are necessary, nor is it necessary that any physical part in the commission of the crime be taken; mere encouragement is enough.

14. Conspiracy (Key) 41

Persons entering a conspiracy after its formation are deemed in law parties to all acts done by any one of the conspirators, before or after persons' entrance, in furtherance of the conspiracy.

15. Homicide (Key) 234(1)

Evidence justified finding that a conspiracy had been committed and finding of the actual participation in and consummation of the conspiracy to murder by defendant and others named in indictment. Section 559.010 RSMo 1949, V.A.M.S.

16. Criminal Law (Key) 822(1)

An instruction is to be considered as a whole and with other instructions in the case.

17. Conspiracy (Key) 41

Criminal Law (Key) 64, 69

Act of one of conspirators in the furtherance of a conspiracy is the act of the other conspirators and principals

in the second degree and accessories before the fact are equally guilty with the principal in first degree. Section 556.170 RSMo 1949, V.A.M.S.

18. Criminal Law (Key) 763(19), 781(5)

In prosecution resulting in conviction of first degree murder, instruction regarding voluntariness of defendant's confession was proper and statement in instruction to the effect that if jury did not believe that a statement, written or oral and claimed to be a confession made by the defendant, was voluntarily made by him, jury should disregard the statement, was not ambiguous, misleading, incomplete or a comment on evidence. Section 559.010 RSMo 1949, V.A.M.S.

19. Criminal Law (Key) 805(3)

In prosecution resulting in conviction of first degree murder, instruction to effect that if jury believed defendant's statement, written or oral, was voluntarily made, jury must consider such statement did not mislead jury although more appropriately the word "may" could have been used rather than the word "must".

20. Criminal Law (Key) 388

Results of a lie detector examination are inadmissible in evidence.

21. Criminal Law (Key) 900

The statutory right of an accused to no reference to his failure to testify may be waived by him. Section 546.270 RSMo 1949, V.A.M.S.; 42 V.A.M.S. Supreme Court Rules, rules 26.08, 28.02, 28.08.

22. Criminal Law (Key) 721(2)

When an accused takes the stand in his defense, his failure to testify on specific facts involved in the case is a legitimate subject of comment by the state in argument.

23. Criminal Law (Key) 721(2)

Where defendant, accused of murder in first degree, had taken the stand, defendant's failure to deny incriminating facts was open to comment whether the denial should have occurred in an appearance in chief or in an appearance in surrebuttal. Section 546.270 RSMo 1949, V.A.M.S.; 42 V.A.M.S. Supreme Court Rules, rules 26.08, 28.02, 28.08.

Mark H. Hennelly, St. Louis, for appellant.

John M. Dalton, Atty. Gen., Winston Cook, Sp. Asst. Atty. Gen., for respondent.

BOHLING, Commissioner.

James William Stidham appeals from a sentence of life imprisonment for the first degree murder of Walter Lee Donnell during the riot at the Missouri Penitentiary on the evening of September 22, 1954, in Cole County, Missouri. § 559.010. (Statutory references are to RSMo 1949 and V.A.M.S.) The indictment charged defendant, William R. Hoover, Jackie Lee Noble, Paul Edward Kenton, Rollie Laster, Don Wm. DeLapp and Joseph M. Vidauri with the commission of the offense. All were inmates of the penitentiary. Defendant's case, upon his application for change of venue, was tried in the Circuit Court of Butler County, Missouri, in July, 1955. Defendant was well represented by counsel. He has filed no brief. His motion for new trial presents many issues.

The defense was an alibi; but certain issues call for some detail of the facts.

[1] I. There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted in evidence before the State established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, found the issue was for the jury, and later, after hearing the evidence before the jury, submitted the issue to the jury for determination. The testimony was to like effect at each hearing. Two members of the State Highway Patrol and four members of the St. Louis Metropolitan Police force, present at the time defendant claimed physical violence occurred, testified that no promises had been given, or physical violence, duress, threats or abuse was offered to defendant, categorically denying defendant's testimony. On the conflicting showing the issue of the voluntariness of the confession was for the jury. State v. Gibilterra, 342 Mo. 577, 116 S.W. 2d 88, 93 [3, 4]; State v. Laster, Mo., 293 S.W.2d 300, 303 [1, 2]; State v. Sanford, 354 Mo. 998, 1006 [4], 193 S.W.2d 31, 37, 38 [2]; State v. Menz, 341 Mo. 74, 106 S.W.2d 440, 448 [12].

Defendant stated, among other things, in his confession, written in his own hand, that several prisoners broke into death row and Paul Kenton unlocked his cell door. He and several other prisoners then went to Creighton's cell to attack him but he had his lock blocked and they could not enter. They then entered Donnell's cell, and, quoting: "Kenton held Donnell while Laster stabbed him several times with an ice pick, at the same time I slashed at him three or four times around the face and neck with a knife that Kenton gave me when he opened the door. When Donnell fell to the floor Linder and Thompson each said get Donnell with the sledge and they proceeded to

hit him with a sledge hammer and a crowbar." Defendant also orally stated that he did not like Donnell because Donnell had snitched in regard to a riot in July and caused defendant to be punished; that Donnell had snitched on some of the boys and they had received a lot of time; and that he was living his life under a different code than the officers.

The jury could find, aside from defendant's confession, the following outlined facts from the evidence.

The homicide occurred in what is known as "death row." Death row, consisting of thirty-two cells, was located in the basement of "B" Hall. Three heavy steel gates or doors separated death row proper from other parts of the building. B Hall proper, above death row, housed a cell block.

The riot started about 6:30 p. m. September 22, 1954. Nine inmates, for various reasons were confined in death row that evening. Defendant, who was known as "Slick," and his co-indictee Laster occupied adjoining cells, having been transferred to death row about July, 1954. Donnell, the deceased, and James M. Creighton also occupied adjoining cells in death row, some distance from defendant and Laster.

From the date defendant was placed in death row he would "holler down" and curse and ridicule Donnell, threatened to kill Donnell if he ever got to him, said that "when they come in here and get us out, we are going down there and kill" Donnell and Creighton; and that they should have killed Donnell over in E Hall when they broke out over there.

Clarence Dietzel was on guard duty in death row the night of the riot. He noticed the disturbance and started closing the windows to death row. Defendant and Laster

demanded that the windows opposite their cells be left open.

About 7:00 or 7:30 p. m. some of the rioters tried to break into B Basement. While the prisoners were trying to break into death row, defendant and Laster "hollered" that they would be down to kill Donnell and Creighton as soon as they got out of their cells. Defendant said he was going to kill Donnell because Donnell took the stand against one Thompson and some others.

DeLapp, known as Curley, Kenton, Noble, Hoover, and Vidauri, were among the number trying to break in. They worked on the first door with a sledge hammer, crowbars, pick and other small tools. DeLapp called to defendant, saying: "Slick, this is Curley DeLapp. We will be in to get you out if it takes, costs us hell and high water." "We are coming down to get you out. We are going to get you out." Defendant answered: "Hurry up, Goddamn it, I am waiting for you." DeLapp sent Hoover and Kenton out to burn the buildings. They returned. Vidauri guarded a paint bucket containing knives, having 5 or 6 inch blades, used in the twine plant. After working on the door for a while, DeLapp called to defendant that they could not make it and were going to try something else. Defendant told DeLapp to come around to the south windows and said he might make it there. DeLapp, Noble, Hoover and Kenton went out and tried to make an entrance through the wall into death row with the sledge hammer. Defendant and Laster talked to DeLapp through the open windows and had him go back and work on the door. They again started to work on the door and DeLapp called to defendant saying: "We are going to try again." Then, in a short time someone produced a key and the men came into B Basement proper. DeLapp and also Kenton demanded Dietzel's keys, threatening to kill him if he refused to hand

them over. Dietzel insisted he did not have the keys and did not give the keys to them. DeLapp with the help of others, then broke the lock on the second door with a sledge hammer. DeLapp, Noble, Kenton and Hoover immediately entered to where guard Dietzel was. They placed Dietzel on a small table and searched him for the keys, Kenton pulling the lining completely out of his coat. DeLapp ordered Dietzel to call the warden's office and immediately took the telephone from him. About this time the door to death row proper opened. Noble and Kenton placed Dietzel in one of the death row cells, where he remained for about twenty minutes, and was then taken up the steps and placed in the mop room in B Hall.

DeLapp, Noble, Kenton, Hoover, Vidauri and one Miller finally released defendant and Laster, as well as other prisoners who desired to be released from their cells in death row. DeLapp led them up the aisle and said to the onlookers: "Get back men, they are coming out now"; and when they came out and stopped, DeLapp put his arm around defendant's shoulders and said: "Gentlemen, I have brought you this far, this is your leader from here on." Defendant answered: "Well men, I am ready to work." They then went into the room where Vidauri was guarding the knives and returned to death row armed with weapons. Defendant told Vidauri to go ahead but Vidauri answered, "No, I am going with you. I am all the way with you guys." They then went back into death row. DeLapp had the other inmates go upstairs in B Hall.

Defendant, Laster, Hoover, DeLapp, Kenton, Noble and Vidauri tried to break into Creighton's cell. They had a sledge hammer, a pole and other weapons. Creighton had jammed his lock with concrete and a comb. Defendant said he was going to settle the score with Donnell and

Creighton. They broke Creighton's jaw in two places, using a pole. He got the pole away from them, and started using it on them. Defendant told Donnell they would be over to get him next. They could not get Creighton's cell door open and started working on Donnell's door. Creighton heard Donnell's door go back and saw the seven men walk up to go into Donnell's cell. He could not see through the cell walls. He heard Donnell hollering: "I ain't no rat, I ain't no snitch. And I ain't never harmed you boys," and he was begging them. Pretty soon Donnell was going Oh, oh, and he hollered real loud and got to kind of gurgling. The men then ran out of Donnell's cell and up the aisle. They went to a wash basin and each washed his hands. Defendant and Noble took off their undershirts and discarded them.

Donnell received a multiplicity of wounds. He had five stab wounds in the front and four stab wounds in the back on the left side in the region of the heart and lungs. Two of the front wounds passed completely through his heart and two of the back wounds penetrated his heart. His skull had sustained an egg shell type fracture, three or four inches in area, a multiple crushing type fracture of many small fragments, which could have been made by a bloody, 16-pound sledge hammer found alongside his body about 10:30 p. m. that day by an officer. He had other wounds on his body.

[2] II. Defendant contends error resulted from the court's failure to instruct on murder in the second degree and manslaughter. The defense was an alibi. The only submissible issue of guilt under the evidence was murder in the first degree. State v. Taylor, 347 Mo. 607, 148 S.W. 2d 802, 805 [5]; State v. Clymer, Mo., 159 S.W.2d 808, 812 [9]; State v. Barbata, 336 Mo. 362, 80 S.W.2d 865, 868 [1, 2]. See State v. Laster, Mo., 293 S.W.2d 300, 302, and §

559.010. It also follows that error was not committed in overruling defendant's motions for judgment of acquittal and judgment of acquittal as to murder in the first degree.

[3,4] III. Defendant's contentions that State's Exhibits No. 1 and No. 9 should not have been received in evidence because hearsay, not properly identified and because such action violated his constitutional rights are without merit. The testimony established that Exhibit 1 was a diagram of the floor plan of B Basement, showed the location of the cells, steel gates, et cetera, was drawn to scale, and it was identified by the person making it and others. State's Exhibit 1 was admissible. State v. McGee, 336 Mo. 1082, 83 S.W.2d 98, 107 [26]; State v. McHarness, Mo., 255 S.W.2d 826, 829 [6]. Exhibit 9 was a bloody 16-pound sledge hammer found at the side of Donnell's body by W. S. Barton of the State Highway Patrol about 10:30 p. m. the night of the riot. It was also identified by a number of other witnesses. Defendant's confession refers to the use of a sledge hammer in the killing of Donnell. There was no error in the admission of Exhibit 9. State v. Hopkins, 278 Mo. 388, 213 S.W. 126, 128 [5]; State v. Wilson, 223 Mo. 173, 189, 122 S.W. 671, 676 [5].

[5] IV. During the examination of Officer Eitzman of St. Louis, who was present at the time defendant gave his written confession, the officer stated he talked to defendant "and explained to him that I had a statement * * *." Defendant's objection to the remark was sustained and the witness was instructed not to testify to any statements made by other prisoners and conveyed to defendant by the witness. Notwithstanding the court's ruling, defendant's motion for new trial asserts the court could not cure the alleged error. A more questionable situation arose under similar circumstances in State v. Vidauri, Mo., 293 S.W.2d 955, 956 [2,3], and was ruled against defend-

ant's contention. See State v. Montgomery, Mo., 223 S.W. 2d 463, 466 [11,12]. The point is ruled against defendant.

[6,7] V. Defendant claims error in the exclusion of his Exhibits B, C, C-1, and D. Exhibit B was never offered in evidence.

Defendant objected to James M. Creighton being sworn as a witness on the ground he was of unsound mind and incompetent. The jury was excused and a voir dire hearing was conducted at which Mrs. Alma Miller, the Medical Records Clerk of State Hospital No. 1, at Fulton, and Creighton were examined. Mrs. Miller produced a file of a number of pages marked defendant's Exhibit B for identification, and out of the file defendant offered and the court accepted in evidence at the voir dire examination two typewritten sheets marked defendant's Exhibits C and C-1; and another typewritten sheet marked defendant's Exhibit D.

Creighton testified on voir dire that he had been in "solitary" for about eighteen months and "played crazy," put on a good act to get out of solitary and be sent to the State Hospital and after thirty-five days was returned to the Penitentiary; that he had never been before a Probate Court and committed as an insane person; and that he had been in a mental institution only that one time. The court found that Creighton was a competent witness.

Later, upon Creighton's cross-examination before the jury defendant developed that Creighton had put on a pretty good act and had been transferred to the State Hospital at Fulton, where he remained five or six weeks before being retransferred to the Penitentiary, and placed in death row in May, 1954. Upon an objection being interposed to a question, counsel for defendant, out of the presence of the jury, stated he was asking the court to

make Creighton's competency as a witness a jury question. The court informed counsel the jury passed on the credibility of witnesses but not their competency and counsel was entitled to examine the witness on any matters affecting his credibility. Counsel stated he would not pursue the matter further. His subsequent offer of said Exhibits C, C-1, and D in evidence before the jury was refused.

Mrs. Miller testified that Exhibits C and C-1 were attached to a Missouri Penitentiary letterhead; that she did not know who made the record or when it was made, and could not say it was a record of State Hospital No. 1; and with respect to Exhibit D she was not willing to swear it was correct because it was not signed. The showing was such as to permit of a finding that the sources of information, and method and time of preparation of the exhibits were not such as to justify their admission before the jury. § 490.680; Gray v. St. Louis-San Francisco R. Co., 363 Mo. 864, 254 S.W.2d 577, 579 [1]. In addition, it was the court's function, and not the function of the jury, to pass on the competency of the witness. § 491.060; State v. Whitsett, 232 Mo. 511, 526(IV), 134 S.W. 555, 560(4); Kleinschmidt v. Bell, 353 Mo. 516, 183 S.W.2d 87, 91 [4,5]; State v. Herring, 268 Mo. 514, 188 S.W. 169, 172 [3, 5-8]; 97 C.J.S. Witnesses § 119 f, p. 541; 2 Wigmore on Evidence 523, §§ 487, 497(c).

[8,9] VI. The court sustained an objection to defendant's offer of proof at the close of the cross-examination of witness Creighton that he had access to one Mary Annis, they both being confined in the Cole County jail at the time of trial. Thereafter and prior to the calling of the next witness the court made it clear to defendant's counsel that he was at liberty to show the interest of the witness in testifying in the case and to develop any arrangement made covering any special privileges in connection with

his testimony, and offered to recall the witness for further cross-examination. Defendant's motion for new trial states the court erred in not permitting him to cross-examine the witness completely with respect to his association with Mary Annis. Trial courts may exercise a sound discretion as to the extent of the examination of witnesses with respect to specific acts on collateral matters affecting their credibility and not directly connected with the issues on trial. Adriance v. Arnot, 31 Mo. 471; State v. Nasello, 325 Mo. 442, 30 S.W.2d 132, 139 [26]; State v. Brotherton, Mo., 266 S.W.2d 712, 714 [2]. Counsel did not avail himself of the court's offer to recall the witness and may not now successfully urge reversible error.

VII. Defendant makes many attacks on the State's main instruction, Instruction No. 4, which, after defining "felonious," and other terms, reads, in so far as questioned:

"Bearing in mind these definitions and those included in the other instructions, the court instructs the jury that if you believe and find from the evidence, beyond a reasonable doubt, that Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner and by the means hereafter set forth in this instruction, and if you believe and find from the evidence, beyond a reasonable doubt, that pursuant to such a conspiracy and agreement those aforesaid persons, acting in concert and together, on September 22, 1954, in Cole County, Missouri, wilfully, deliberately, premeditatedly, and with malice aforethought did make an assault upon Walter Lee Donnell, and then and there did wilfully, deliberately, premeditatedly, and with malice aforethought forcibly strike, hit,

stab, cut, and beat Walter Lee Donnell in and upon his face, head, and body, with a sledge hammer, and a knife, and another sharp instrument or dagger, if you so find, thereby giving Walter Lee Donnell about his face, head, and body, mortal wounds from the effects of which he died on September 22, 1954, if you so find, and if you further believe and find from the evidence, and beyond a reasonable doubt, that the defendant, James William Stidham, at the time of such killing and murdering, was a member of the conspiracy and agreement aforesaid and theretofore had conspired and agreed with Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri, to aid, abet, assist or encourage them in the killing and murdering of Walter Lee Donnell at the time and place and in the manner and by the means aforesaid, and if you further believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, pursuant to such conspiracy and agreement, was actually present during the killing and murdering aforesaid of Walter Lee Donnell, and that he knew of the felonious purpose and intent of Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph Vidauri to kill and murder Walter Lee Donnell as aforesaid, and that James William Stidham then and there knowingly and intentionally aided, abetted, assisted, or encouraged the aforesaid persons, or any of them, in the aforesaid killing and murdering, then you should find the defendant, James William Stidham, guilty of Murder in the First Degree and by your verdict so say. * * *"

[10] a. The required finding of the instruction that pursuant to a conspiracy the conspirators acting in concert "then and there did wilfully, deliberately, premeditatedly, and with malice aforethought forcibly strike, hit, stab, cut,

and beat Walter Lee Donnell in and upon his face, head, and body, with a sledge hammer, and a knife, and another sharp instrument or dagger, if you so find, thereby giving Walter Lee Donnell about his face, head and body, mortal wounds from the effects of which he died on September 22, 1954, if you so find," refutes defendant's assertion that the instruction did not require the jury to find that the conspirators wilfully, et cetera, killed Donnell.

[11] b. The use of the words "kill and murder" and "killing and murdering" and their repetition several times in the instruction did not, as stated by defendant, constitute a comment on the evidence, or single out and give undue prominence to such words, under the facts adduced in evidence by the State and did not assume a murder had been committed. The instruction required the finding of the submitted facts beyond a reasonable doubt. The defense was an alibi; and there was no contention or evidence that Donnell had not been murdered.

[12, 13] c. Defendant questions the use of the words "aid, abet, assist or encourage" and "aided, abetted, assisted, or encouraged" in the instruction, contending the use of the terms disjunctively rather than conjunctively erroneously authorized a conviction upon a finding that defendant did any one of the four acts. Under § 556.170 principals in the second degree in the commission of any felony or accessories to any murder or other felony before the fact "may be charged, tried, convicted and punished in the same manner, as the principal in the first degree." Consult also § 556.120 on the offense of conspiracy. Blackstone's Commentaries, Vol. 4, Ch. III, p. *34, defines a principal in the first degree as "the actor or absolute perpetrator of the crime; and in the second degree he is who is present, aiding and abetting the fact to be done"; and an accessory before the fact "to be one

who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime." See authorities there cited; also 22 C.J.S. Criminal Law §§ 85-93, p. 152; 14 Am.Jur. 820, B, 832, C. It is stated in 22 C.J.S. Criminal Law § 88, p. 159, with respect to principals in the second degree, in the absence of statutory provisions that "no particular acts are necessary; nor is it necessary that any physical part in the commission of the crime be taken; mere encouragement is enough." And see Id., § 93, p. 164, with respect to an accessory before the fact. McMannus v. Lee, 43 Mo. 206, 208, states: "The law is well laid down that any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as a principal * * *." Approved in State v. Walker, 98 Mo. 95, 104, 110(11), 9 S.W. 646, 650, 652(11), 11 S.W. 1133, and other cases. See also State v. Messino, 325 Mo. 743, 766(V), 30 S.W.2d 750, 760(V); State v. Lawrence, Mo., 280 S.W.2d 842, 848; State v. Ruffin, Mo., 286 S.W.2d 743, 748 [10, 11]; State v. Murray, Mo., 193 S.W. 830, 832; State v. Clymer, Mo., 159 S.W.2d 808, 811 [8]; People v. Chapman, 62 Mich. 280, 284, 28 N.W. 896, 897. The submission was not erroneous.

[14, 15] d. We have hereinbefore stated enough, but not all, of the evidence favorable to the State. Generally, a conspiracy is not shown by direct evidence. It is often inferred from the circumstances. State v. Parr, 296 Mo. 406, 246 S.W. 903, 906 [8]. In the instant case there was ample evidence for a finding of the conspiracy submitted and the actual participation in and consummation of the said conspiracy by the persons named in the instruction. Persons entering a conspiracy after its formation are

deemed in law parties to all acts done by any one of the conspirators, before or after his entrance, in furtherance of the conspiracy. State v. Walker, 98 Mo. 95, 105, 106, 9 S.W. 646, 650; State v. Crab, 121 Mo. 554, 563, 26 S.W. 548, 550; State v. Richetti, 342 Mo. 1015, 119 S.W.2d 330, 342 [14, 15]; 15 C.J.S. Conspiracy § 75, p. 1107; 11 Am.Jur. 571, § 40.

[16] An instruction is to be considered as a whole and with the other instructions in the case. Instruction No. 4 is to be read with No. 5, set out infra. The Missouri cases cited to Point VII, c. sustain Instruction No. 4. It was more favorable to defendant than the law required it to be. We need not detail the other attacks against it.

VIII. Defendant's motion questions Instruction No. 5, which reads:

"The Court instructs the jury that, if you believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, and William R. Hoover, Rollie Laster, Paul Edward Kenton, Jackie Lee Noble, Don William De Lapp and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner and by the means set forth in Instruction No. 4, then the act of either of them pursuant to such conspiracy and agreement to kill and murder Walter Lee Donnell would be in law the act of each one so conspiring and agreeing.

"The word 'Conspiracy,' as used in these instructions, means a common agreement and understanding between two or more persons which is formed for the purpose of committing and doing by their joint efforts some criminal act.

"The Court instructs the jury that all persons are principals who are guilty of acting in concert and together in the commission of a crime. When a crime is actually committed by one or more persons and another person is actually present, and, knowing of the felonious purpose and intent of the person or persons committing the crime, he knowingly and intentionally aids, abets, assists or encourages the person or persons actually committing the crime in the commission of the same, then such person so knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons actually committing the crime in the commission of the same is a principal and he is equally guilty with the person or persons who actually commits the crime.

"However, you are further instructed that the mere presence of a person at the time and place of the commission of a crime by another or others is not alone sufficient to justify him in any manner responsible for the commission of such crime. On the contrary, before such person can be found in any manner responsible for the commission of such crime, the evidence in the case must show, beyond a reasonable doubt, not only that such person was actually present at the commission of such crime, but also that such person knew of the felonious purpose and intent on the part of the person or persons actually committing the crime, and that he then and there was knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons committing the crime in the commission of the same."

[17] This instruction is to be considered with the other instructions in the case. The submitted facts of the first paragraph of Instruction No. 5 were required to be found beyond a reasonable doubt. The other paragraphs of the instruction are merely definitive, legal statements of

what constitutes a conspirator and a conspiracy, assume nothing, and are not subject to successful attack on the ground they are abstract. We have hereinbefore held there was substantial evidence of the submitted conspiracy embracing all the named participants. The conspiracy was incidental to the offense charged. It is also the law that the act of one of the conspirators in the furtherance of the conspiracy is the act of the other conspirators, and § 556.170 makes principals in the second degree and accessories before the fact equally guilty with the principal in the first degree. (See instructions in State v. Cantlin, 118 Mo. 100, 107, 111(II), 23 S.W. 1091, 1093, 1095(2), considered to fairly cover the issue.) What we have hereinbefore said sufficiently answers defendant's attacks against Instruction No. 5. Instructions less favorable to a defendant have been approved. State v. Walker, supra; State v. Messino, supra; State v. Murray, supra; State v. Lawrence, supra; State v. Clymer, supra; State v. Nasello, 325 Mo. 442, 459(IV), 30 S.W.2d 132, 137(IV) (instruction 2 therein being to the same effect as instruction 2 set out in State v. Messino, supra); State v. Williams, 309 Mo. 155, 274 S.W. 427, 434(VII); State v. Dowling, 360 Mo. 746, 230 S.W.2d 691, 694 [6]; State v. Mayberry, Mo., 272 S.W.2d 236, 243 [20].

[18] IX. Defendant also questions Instruction No. 6, which reads:

"The Court instructs the jury that before any alleged statement can be valid, and before you can even consider it, it must have been made voluntarily, that is to say, without anyone having offered to the person who is claimed to have made such a statement any hope of leniency or reward of any kind for making such statement, and without anyone making any threat or doing any violence to the person claimed to have made any such statement in order to induce or force him to confess.

"If the jury does not believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury should entirely disregard such statement in arriving at your verdict.

"If, however, the jury does believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury must consider such statement and you should give it such weight as you believe it deserves in arriving at your verdict."

We do not agree with the contention in defendant's motion that the clause "claimed to be a confession made by the defendant" is ambiguous, misleading, incomplete and a comment on the evidence. The State's evidence was that the statements were voluntary and defendant's evidence was to the contrary. No intelligent jury would be confused. It was proper to instruct on the voluntariness of defendant's statement. State v. Cunningkin, Mo., 261 S.W.2d 85, 87.

[19] Defendant contends in his motion the use of the word "must" in the third paragraph of Instruction No. 6 gives judicial direction to the jury, invades the province of the jury and is a comment on the evidence. The instruction is a cautionary instruction on a collateral issue, does not direct a verdict, and is not on an issue the court is required to instruct upon as part of the law of the case under Sup.Ct. Rule 26.02, 42 V.A.M.S. § 546.070(4); State v. Cunningkin, Mo., supra; State v. Gibilterra, 342 Mo. 577, 116 S.W.2d 88, 94, 95; State v. Francies, Mo., 295 S.W.2d 8, 15 [24, 25]. Trial juries "shall be sworn well and truly to try the case." Sup.Ct.R. 26.02. See §§ 546.070, 546.220; State v. Duff, 253 Mo. 415, 424(IV), 161 S.W. 683, 685(IV). The oath administered to trial jurors embraces the obligation to try the case according to the evidence. Consult 50

C.J.S. Juries § 296, p. 1088; 2 Hale, Pleas of the Crown, 293. The instruction made it plain that before the jury could "even consider" defendant's statement, the jury should find "it must have been made voluntarily," and if the jury did not so find, the jury "should entirely disregard" it in reaching the verdict. An instruction substantially identical to the instant instruction was given in State v. Laster, Mo., 293 S.W.2d 300, 304, a companion case, and we stated, no issue being presented, "an adequate instruction was given on this subject." In State v. Stibbens, 188 Mo. 387, 396(III), 87 S.W. 460, 462(3), an instruction told the jury "you should take such confession into consideration" if voluntarily made. See State v. Pillow, Mo., 169 S.W.2d 414, 416; State v. Hostetter, Mo., 222 S.W. 750, 753(II); State v. Hartman, Mo., 272 S.W.2d 276 [1, 2]. We are not approving the use of the word "must" in the instruction. A more appropriate word would be "may." However, the jury, if it found defendant voluntarily made the statement, would, unless it violated its oath, consider the statement. The questioned clause was modified by the succeeding clause; and under the instruction, if the statement was made voluntarily, the jury was not told how to consider the statement and was free to give the statement no weight whatever in arriving at the verdict. It stated the duty the law placed upon the jury. We conclude on the record before us that the jury was not misled and reversible error did not occur. Consult State v. Harris, 357 Mo. 1119, 212 S.W.2d 426, 428 [7, 8].

[20] X. Defendant complains of the court's overruling of his motion for a polygraph examination of himself, which he offered to pay for. We see no necessity for requesting a court to rule on a motion of this nature. The authorities are to the effect that the results of lie detector examinations are inadmissible in evidence. 23 C.J.S. Criminal Law § 967, p. 295; 20 Am. Jur. 633, § 762; Henderson v. State of Oklahoma, 94 Okl.Cr. 45, 230 P.2d

495, 23 A.L.R.2d 1292, 1306 (annotation). See State v. Cole, 345 Mo. 181, 188 S.W.2d 43, 51 [12]; State v. Hudson, Mo., 289 S.W. 920 [2].

[21-23] XI. Defendant contends in his motion that the court erred in not sustaining his objection to the prosecuting attorney's statement in argument that defendant failed to go back on the stand and rebut certain testimony adduced by the State in rebuttal to testimony given by defendant while on the stand. The statutory right of an accused to no reference to his failure to testify (Sup.Ct.R. 6.08; § 546.270) may be waived by him. State v. Tiedt, 360 Mo. 594, 229 S.W.2d 582, 587 [8]. It is made clear in State v. Larkin, 250 Mo. 218, 234 (III), 157 S.W. 600, 604 [4], 46 L.R.A., N.S., 13, that when an accused takes the stand in his defense, as in the instant case, his failure to testify on specific facts involved in the case is a legitimate subject for comment by the state in argument. State v. Pierson, 343 Mo. 841, 123 S.W.2d 149, 157 [14]: State v. Smith, Mo., 252 S.W. 662, 667 [14]. Having taken the stand, defendant's failure to deny incriminating facts was open to comment whether the denial should have occurred on an appearance in chief or an appearance in surrebuttal.

The transcript discloses that all matters for consideration here upon the record (Sup.Ct.R. 28.02, 28.08) are in proper form and sufficient.

The judgment is affirmed.

BARRETT and STOCKARD, CC., concur.

PER CURIAM.

The foregoing opinion by BOHLING, C., is adopted as the opinion of the court.

EAGER, P. J., and STORCKMAN, J., and BROADDUS, S. J., concur.

LEEDY, J., not sitting.

APPENDIX E—Opinion in: State v. Stidham, No. 52406

STATE of Missouri, Respondent,

v.

James William STIDHAM, Appellant.

No. 52406.

Supreme Court of Missouri,
En Banc.
June 5, 1967.

Appeal from judgment of the Circuit Court, Butler County, Howard R. Maness, J., denying prisoner's second motion to vacate judgment of conviction. The Supreme Court, Storckman, C. J., held that in view of fact that prisoner would, regardless of judgment on appeal, be immediately entitled to proceed under provisions of not yet effective amended rule requiring motions to vacate to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent, prisoner would be granted maximum relief to which he was entitled so that further proceedings could be held in compliance with provisions of amended rule.

Order and judgment reversed and cause remanded with directions.

1. Criminal Law (Key) 998(1)

Although effective date of newly revised rule requiring motion to vacate judgment to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent is September 1, 1967, trial courts may use the new procedure before that date. V.A.M.R. S.Ct. Rule 27.26.

2. Criminal Law (Key) 998(21)

Amended rule requiring motions to vacate judgment to be in questionnaire form and providing for appointment of counsel if the motion presents questions of law or issues of fact and movant is shown to be indigent is intended to discover and adjudicate all claims for relief in one application and avoid successive motions. V.A.M.R. S.Ct. Rule 27.26.

3. Criminal Law (Key) 1189

In view of fact that regardless of whether denial of prisoner's second motion to vacate judgment of conviction was affirmed or reversed, he would be immediately entitled to proceed under not yet effective amended rule requiring motions to vacate to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent, prisoner was granted maximum relief to which he was entitled so that order and judgment denying motion were reversed and cause was remanded with directions that all further proceedings be in compliance with amended rule. V.A.M.R. S.Ct. Rule 27.26 (c, e, h, i).

Norman H. Anderson, Atty. Gen., Walter W. Nowotny, Jr., Asst. Atty. Gen., Jefferson City, for respondent.

James William Stidham, pro se.

STORCKMAN, Chief Justice.

The appellant James William Stidham is a prisoner in the Missouri State Penitentiary where he is serving a sentence of life imprisonment for murder. The judgment of conviction was affirmed by this court on September 9, 1957. State v. Stidham, Mo., 305 S.W.2d 7. On March 9, 1964, Stidham, pursuant to S.Ct. Rule 27.26, V.A.M.R. filed pro se in the Circuit Court of Butler County a motion to

vacate and set aside his sentence. The motion to vacate was denied without an evidentiary hearing and on appeal this court on June 13, 1966, affirmed the order and judgment. State v. Stidham, Mo., 403 S.W.2d 616. Thereafter, Stidham filed pro se a second motion to vacate under Rule 27.26 which presented claims not made in his first motion. The trial court without an evidentiary hearing also denied the second motion to vacate and the prisoner's appeal from that order and judgment is now before us. The movant filed a brief pro se in this court and made an oral argument.

[1] On January 9, 1967, this court adopted a revised S.Ct. Rule 27.26. The effective date of the revised rule is September 1, 1967, but the trial courts may use the new procedure before that date. State v. Garner, Mo., 412 S.W.2d 155, 157.

[2] The amended rule was adopted after considerable study and is intended to provide a post-conviction procedure in accord with the principles enunciated in the so-called trilogy of Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148, Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837, and Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770. Further in keeping with the teachings of the trilogy, the amended rule is designed to discover and adjudicate all claims for relief in one application and avoid successive motions by requiring motions to be in questionnaire form and by providing for the appointment of counsel if the motion presents questions of law or issues of fact and the movant is shown to be indigent.

[3] These and other provisions intended to furnish more adequate post-conviction relief were not provided by Rule 27.26 in effect at the time the present motion was filed or when the appeal was argued and submitted in this court. It is apparent, however, that regardless of whether

this court affirms the order and judgment, or reverses and remands the cause, the movant will be immediately entitled to proceed under the provisions of amended Rule 27.26 and compliance with the amended rule would be obligatory after September 1 this year. In these circumstances, it would be improvident to process the appeal further and undertake to prepare an opinion on the merits. The maximum relief to which the appellant is entitled in this court is a reversal of the order and judgment of the trial court and a remand for further proceedings under amended Rule 27.26. Bosler v. Swenson, 8 Cir., 363 F.2d 154; Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33. Furthermore, it appears that appellant's motion raises one or more issues of fact on which appellant would be entitled to an evidentiary hearing.

Accordingly, the order and judgment is reversed and the cause is remanded with directions that all further proceedings be in compliance with the provisions of amended Rule 27.26. If appellant elects to proceed with his motion in the trial court, counsel must be appointed under subparagraph (h) of the amended rule since appellant has been shown to be an indigent person. Counsel should file an amended motion which includes every ground known to the prisoner for vacating, setting aside or correcting his conviction and sentence and the prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him, all as required by subparagraph (c) of the amended rule. The trial court then is required to conduct a full evidentiary hearing on the amended motion as required by subparagraph (e) of the amended rule, assuming that the motion raises questions of fact as does the present motion, after which the court then is to decide all issues of fact and questions of law, making findings of fact and conclusions of law as required by subparagraph (i) of amended S.Ct. Rule 27.26.

All of the Judges concur.

APPENDIX F—Opinion in: State v. Stidham, Reinstated Appeal, Nos. 45537 and 54674

STATE of Missouri, Respondent,

v.

James W. STIDHAM, Appellant.

Nos. 45537, 54674.

Supreme Court of Missouri,
Division No. 2.
Feb. 9, 1970.

The Supreme Court set aside its affirmance of prior postconviction judgment and remanded cause for amendment of motion to vacate in view of revised postconviction procedure. The Circuit Court of the City of St. Louis, Michael F. Godfrey, J., and the Circuit Court of Butler County, Randy Weber, J., entered judgment from which petitioner appealed. The Supreme Court, Barrett, C., held that even though indictment did not charge conspiracy, instruction hypothesizing that defendants conspired, acted in concert, and aided and abetted in killing did not violate due process on theory that it violated constitutional proscription against jury's consideration of crime not included in indictment where evidence supported hypothesis, indictments charged defendants with killing victim by assault with deadly weapons with malice aforethought and conspiracy was inherent and may have been incidentally included offense.

Affirmed.

1. Constitutional Law (Key) 268(2)

Even though indictment did not charge conspiracy, instruction hypothesizing that defendants conspired, acted in concert, and aided and abetted in killing did not violate due process on theory that it violated constitutional pro-

scription against jury's consideration of crime not included in indictment where evidence supported hypothesis, indictments charged defendants with killing victim by assault with deadly weapons with malice aforethought and conspiracy was inherent and may have been incidentally included offense. V.A.M.S. Const. art. 1, § 18(a); Sections 544.250, 556.120, 556.130, 556.170 RSMo 1959, V.A.M.S.

2. Constitutional Law (Key) 268(2)

Instruction defining conspiracy and stating that all persons who are guilty of acting in concert and together in commission of crime are principals did not infringe on due process by allowing state to prove and jury to be instructed to consider crime not included in indictment where instruction was warranted by statute and there was evidence of conspiracy, actual participation in and consummation, in conspiracy by defendants even though indictment did not charge conspiracy. V.A.M.S. Const. art. 1, § 18(a); Sections 544.250, 556.120, 556.130, 556.170 RSMo 1959, V.A.M.S.

3. Constitutional Law (Key) 268(8)

Record containing corroboration for testimony of two witnesses, alleged to have given perjured testimony, failed to establish violation of due process by state's knowing use of perjured testimony based on fact that such witnesses who had been inmates, had had their sentences commuted and had been released from prison. V.A.M.R. Crim. Rule 27.26.

4. Constitutional Law (Key) 268.1(3)

Where defendant was not prosecuted by information, but by indictment, eliminating need for preliminary hearing, failure of court to appoint counsel at preliminary hearing, even though defendant requested counsel at such hearings, did not deny defendant due process of law. Section 544.250 RSMo 1959, V.A.M.S.

5. Criminal Law (Key) 998(17)

Record, including many pretrial motions by defendant's counsel, failed to support defendant's allegation of lack of counsel prior to trial.

6. Criminal Law (Key) 531(3)

Record failed to support claim that defendant's confession was extracted through physical force and threats of physical force by being beaten with cork ball bat and by not being given any food or water for three days.

7. Constitutional Law (Key) 266

Where, after trial judge overruled motion to suppress confession, all witnesses testified to same facts and circumstances as they had on motion to suppress as it related to issue of voluntariness, and upon this testimony issue of voluntariness was submitted to jury, court's procedure for determining voluntariness did not fail to comport with minimum standards of due process.

8. Criminal Law (Key) 1172(2)

Instructions on voluntary confession were not prejudicially erroneous where there was, at time of trial, only claim that oral and written confessions were obtained by physical force and violence, and no claim of mental coercion and where claim of mental coercion was not raised until 13 years later on motion to vacate sentence. V.A.M.R. Crim. Rule 27.26.

9. Criminal Law (Key) 998(6)

Where, at time defendant gave his statements, circumstances surrounding victim's death and defendant's part in it were known, and defendant's statements played but little if any part in his conviction in view of other testimony,

claim that statement was not voluntary, on ground that three errors, one in age, one in place of residence and prior record, conclusively established that statement was not voluntary, was not ground for postconviction relief. V.A.M.R. Crim. Rule 27.26.

10. Criminal Law (Key) 532

In view of trial court's opinion that statement given by defendant "is and should be admissible in evidence" supported by cogent and convincing evidence, allowing statement to go to jury did not violate Supreme Court decision establishing procedure for admission of confession.

John C. Danforth, Atty. Gen., Kenneth M. Romines, Asst. Atty. Gen., Jefferson City, for respondent.

Mark M. Hennelly, St. Louis, for appellant.

BARRETT, Commissioner.

In 1952 James William (known to one and all as "Slick") Stidham was sentenced to 25 years' imprisonment for his part in the armed robbery of the Grapette Bottling Company in Joplin. For the details of that crime see State v. Stidham, Mo., 258 S.W.2d 620. On October 3, 1955, after a jury trial and verdict in July 1955, Stidham was sentenced to life imprisonment for his participation in the slaying of fellow-inmate Walter Lee Donnell on September 22, 1954, at the height of the riot of approximately 800 inmates of the main prison in Jefferson City. In the trial of the latter case and now, at the behest of Father Clark, he has been represented by a distinguished lawyer, Mr. Mark M. Hennelly, then a successful and experienced criminal lawyer, now a vice-president and general counsel of one of the larger railroads. The murder conviction was appealed upon a full transcript of three volumes, there

was a complete appellate review, the opinion was turned into twenty-three headnotes, after counsel raised what he deemed, no doubt every conceivable point and error. That conviction of murder was affirmed on September 9, 1957, in State v. Stidham, Mo., 305 S.W.2d 7. In view of some of the problems now raised it should be pointed out that before the murder case reached trial stage Stidham's diligent counsel filed every conceivable motion and plea, including the right to a change of venue which accounts for the trial in Butler County, many miles from Jefferson City. Over the years, following the affirmation of the life sentence, Stidham has lodged in this court innumerable letters, communications and pro se motions and they have all been responded to. In June 1966 he personally filed and argued an appeal from a 27.26, V.A.M.R. proceeding in Butler County in which he attempted to present several of the issues now before the court. State v. Stidham, 403 S.W. 2d 616. In the meanwhile the court en banc revised its post-conviction procedure, and Stidham having unsuccessfully instituted another 27.26 proceeding, this court set aside its affirmance of the prior post-conviction judgment and remanded the cause for an amendment of the motion to vacate "which includes every ground known to the prisoner," and in the spirit of the rule for "a full evidentiary hearing" on all questions of fact. The order and judgment in that opinion is reported in State v. Stidham, 415 S.W.2d 297. And on that proceeding, on Stidham's behalf, there has been a change of venue from Butler County and there has been a new and complete hearing before Honorable Michael F. Godfrey, a circuit judge in St. Louis. Furthermore, in response to what was deemed to be the spirit of the Bosler cases, (Bosler v. Swenson, 8 Cir., 363 F.2d 154 and Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33) the court en banc set aside the judgment of this court upon the original appeal, 305 S.W.2d 7, and again appointed Mr. Hennelly

to represent Stidham in both cases. As indicated, there was a full hearing on the 27.26 proceeding, all issues were found against Stidham and he has appealed the judgment in that case. In the order setting aside the original submission the two causes were consolidated and are to be disposed of in this opinion. It should be stated in this connection that Mr. Hennelly has raised, extensively briefed, and orally argued every conceivable claim of error in the original trial, all of which covers and includes every possible right to relief in a post-conviction proceeding.

One of the claims of infringement of due process is that the state was "allowed to prove and the jury was instructed to consider a crime not included in the indictment." Const.Mo. Art. I, Sec. 18(a), V.A.M.S. Thus, it is said, he was indicted for the murder of Donnell, but he "was not, however, indicted for participating in a conspiracy to kill Donnell." Therefore, it is urged that the court erred in admitting in evidence conversations and conduct on the part of others engaged in slaying Donnell. By the same token it is contended that the court prejudicially erred in instructing the jury in referring to and hypothesizing a concert of action, an aiding and abetting in slaying Donnell. In the first place the argument overlooks not only the theory but the specific allegations of the indictment. And in the second place it ignores the facts of Donnell's killing, the circumstances in which he was savagely murdered. While Stidham, as well as his codefendants, was given a severance, the indictment charged that "William R. Hoover, Jackie Lee Noble, Paul Edward Kenton, James William Stidham, Rollie Laster, Don Wm. DeLapp and Joseph M. Vidauri[1]

1. The details of Donnell's murder are set forth in the records and appeals of Stidham's codefendants: State v. Laster, 365 Mo. 1076, 293 S.W.2d 300 (certiorari denied 352 U.S. 936, 77 S.Ct. 237, 1 L.Ed.2d 167); State v. Noble, Mo., 387 S.W.2d 522; State v. Kenton, Mo., 298 S.W.2d 433; State v. Vidauri, Mo., 293 S.W.2d 955 and State v. Vidauri, Mo., 305 S.W.2d 437.

* * * did then and there feloniously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought, make an assault upon one Walter Lee Donnell and then and there with dangerous and deadly weapons, to wit: a sledgehammer, and a knife, and another sharp instrument or dagger * * * a wooden table leg, and other blunt instruments * * * and their fists and hands and feet * * * strike, hit, stab, cut, beat and stomp" and thereby kill Donnell. The testimony was that Kenton held Donnell while Laster stabbed him with an ice pick, Stidham "slashed" him with a knife, and two others hit him in the head with a sledgehammer. In addition to other bruises and contusions an autopsy on Donnell's body revealed "a severe mashed in, or compressed area in the right side of the face approximately just underneath the right eye, that extended back, involving the right ear with separation of the lower part of the ear, lower part of the ear was torn away from the body about a third of its normal attachment area." There was a multiple, crashing, "eggshell type fracture" of the skull, two knife-cut wounds of the neck, five puncture or stab wounds in the chest and four stab wounds in the back. The doctor said that two of the stab wounds had entered the heart cavity and of course were fatal. The testimony showed that until the three doors to Death Row were forced and Stidham and Laster released and Stidham furnished a knife DeLapp led the group bent on killing Donnell. As soon as Stidham was released DeLapp put his arm around Stidham's shoulders and said, "Gentlemen, I have brought you this far, this is your leader from here on." And shortly this group gained entrance to Donnell's cell and killed him. Prior to the riot Stidham had repeatedly threatened to kill both Donnell and James M. Creighton.

[1] This briefly narrated record completely refutes the appellant's claim of an invasion of due process in

submitting "a crime not included in the indictment." The indictment did not in terms charge the misdemeanor offense of conspiracy (RSMo 1959, §§ 556.120, 556.130, V.A.M.S.), even though inherent in the circumstances it may have been an incidentally included offense. Principal instruction number 4 hypothesized that the seven named defendants "entered into a conspiracy and agreement" and "acting in concert and together" and "aided, abetted, assisted or encouraged" in slaying Donnell but, as indicated, the evidence supports the hypothesis. There was a separate conventional instruction defining "conspiracy" stating that "all persons are principals who are guilty of acting in concert and together in the commission of a crime."

[2] The latter instruction was not only warranted by specific statute (RSMo 1959, § 556.170), upon this record, as the court held on the previous appeal, State v. Stidham, 305 S.W.2d l. c. 15, "there was ample evidence for a finding of the conspiracy submitted and the actual participation in and consummation of the said conspiracy by the persons named in the instruction." A case directly in point in every respect is State v. Holloway, 355 Mo. 217, 195 S.W.2d 662, an instance of a murder in a jailbreak. Excerpting, the court said, "Goldie and Buster were co-conspirators with appellant. Their testimony was competent in establishing the fact of the common design or conspiracy. * * * Conversations between Goldie and Buster were competent evidence against appellant although made outside of appellant's presence. * * * Furthermore, *proof that appellant and others conspired together to commit an unlawful act and that the killing occurred in furtherance of the conspiracy may be shown under an indictment or information charging first degree murder only.*" (Emphasis supplied.)

Relying on Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217, appellant contends that due process was violated in that the state knowingly used perjured testimony. This assignment is leveled at the state's use of Herman Trout and James Creighton, also prison inmates, as witnesses. (For a partial review of Creighton's bizarre life from a sentence of death in 1932 to a commutation of prison sentence in 1956 see State v. Creighton, 330 Mo. 1176, 52 S.W.2d 556.) The argument now is directed solely to the fact that the sentences of Creighton and Trout have been commuted and they have been released from prison. In the trial of this cause there was first a motion to disqualify Creighton as a witness upon the allegation that he was of unsound mind. That motion was heard at length, all medical and psychiatric records from the State Hospital at Fulton were introduced, and the court found as was all but obvious that he was indeed not incompetent as a witness. See State v. Stidham, 305 S.W.2d l. c. 13. Upon the original trial and appeal it was sought to establish the claim of perjured testimony or incompetent witness by offering to prove that while Creighton was held in the Cole County jail he was granted special favors, particularly that "he had access to one Mary Annis" (305 S.W.2d 7) despite the appellant's proof from the Fulton Hospital records that Creighton "is a homosexual."

[3] In any event and apart from the federal cases, this court has long since "recognize(d) that a judgment obtained by the knowing use of perjured testimony should be vacated upon a proper factual showing." State v. Garton, Mo., 396 S.W.2d 581. The insuperable difficulty with this particular claim of infringement of due process is that it is not supported by the record. Annotation 3 L.Ed.2d 1991. The only circumstance now present as to both Creighton and Trout is the fact that in July 1955 they did testify as state's witnesses and subsequently

their sentences were commuted by the then Governor of Missouri. And again, on this issue, there was a hearing on the 27.26 motion and aside from the bare fact of the commuted sentences the court found as did another court in 1964 (State v. Stidham, 403 S.W.2d 616) that "(t)he record is barren of facts to support such allegations." It is not necessary to detail their testimony, their evidence and that of numerous other witnesses is all set forth in the appeals of at least five of the participants in Donnell's slaying. On the 27.26 hearing the trial court could have added, after reading the record in Stidham's original appeal, that the testimony of Creighton and Trout was cogently corroborated in every detail by a number of physical facts and by other witnesses, particularly by the prison guard, Mr. Dietzel, on duty in Death Row when Donnell was murdered. In contrast to the testimony of Creighton and Trout there is no corroboration whatever of Stidham's testimony that he went up to B-Hall and spent the night of the riot innocently listening to the radio, had no knowledge of Donnell's slaying and took no part in the riot. The one incriminating circumstance that even he has never and cannot brush away is the conceded fact that after the three doors to Death Row were broken open and after his cell was unlocked he, unlike others and undoubtedly contrary to prison rules, did leave Death Row. Thus upon this record there was no support for the charge of knowing use of perjured testimony.

A further due process point is the claim of the "court's failure to make timely appointment of counsel." Here the appellant relies upon Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 and other landmark cases dealing with the appointment of counsel. It is not necessary here to again examine those cases, their standards

are recognized and applied even though the Miranda and Escobedo cases are not retroactive. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882. There is no factual similarity in this and any of the cited cases, particularly, for example, as in White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193, and Arsenault v. Massachusetts, 393 U.S. 5, 89 S.Ct. 35, 21 L.Ed.2d 5, in which there were pleas of guilty at the preliminary or "at a probable cause hearing" and the pleas were introduced in evidence upon the jury trials. In certain instances in which there has been manifest injustice, this jurisdiction recognized the importance of the right to counsel long before Escobedo and Miranda. See Ex parte Stone, Mo.App., 255 S.W.2d 155; State v. Jackson, 344 Mo. 1055, 130 S.W.2d 595 and State v. Witt, Mo., 422 S.W.2d 304.

The appellant's complaint as to counsel arose in and for the most part is based upon these circumstances: Initially the prosecution of these seven defendants for this particular offense was instituted by the prosecuting attorney in a magistrate court and preliminary hearings were held, a necessary prerequisite and procedure before a formal information could be filed in the circuit court. RSMó 1959, § 544.250. Appellant and his counsel make much ado of the fact that at one of these preliminary hearings he demanded counsel and yelled out asking for some lawyer to come forward. In his brief it is said that there was no appointment of an attorney "until the second arraignment" and in this connection stated that he was never advised of his right to a lawyer—even though he requested one at the preliminary—and that he was entitled to counsel before his mental examination at the United States Medical Center in Springfield.

[4] The basic fallacy in the appellant's contention on this phase of the case is that again there is no factual

basis for his claim of an infringement of rights at a preliminary. In the first place there is neither claim nor proof that anything done or said at any preliminary hearing or in any medical or mental examination was employed against him or that the state even secured any relevant information. State v. Smith, Mo., 411 S.W.2d 208. But more important and decisive here as to counsel at a preliminary hearing is the fact that Stidham was not prosecuted by information. On November 23, 1954, a grand jury returned an indictment charging Stidham and his accomplices with the murder of Donnell. Thus there was no occasion or place for a preliminary hearing. "It is a well-established law of this State that the grand jury may investigate and indict one charged with a felony although he has been arrested and held for a preliminary examination, and is not bound to await the action of the examining court, for the reason that the action of the examining court is no bar to the right of the grand jury to inquire into the case and indict the accused, even though he has been discharged on the preliminary examination." State v. Gieseke, 209 Mo. 331, 339, 108 S.W. 525, 527.

[5] As a matter of fact, other than appellant's assertions, there is no record support for his charges of lack of counsel prior to trial. Whatever may have occurred at any preliminary has not been made a part of this record. In any event, as stated, an indictment was returned, the defendants, the indisputable record recites, were duly arraigned, each defendant was furnished a copy of the indictment and upon the request of Stidham for the appointment of a certain lawyer, the court appointed Mr. Hennelly. Thereafter there were no motions or proceedings or even references to a preliminary hearing or to anything that may have occurred during such a hearing. Mr. Hennelly was appointed to represent appellant on November

23, 1954, and on December 6, 1954, a formal plea of not guilty was entered. Almost immediately, on December 14, 1954, on Stidham's behalf, there were motions for production and inspection of any statements that may have been given, a motion to dismiss for the reason of two offenses—homicide and assault with intent to kill, a motion for a severance, a motion for a polygraph examination and a motion to suppress any statement he may have given. These procedures were all considered in turn and disposed of, including a motion for a continuance and finally an application for a change of venue. The cause proceeded to trial and in the first instance a mistrial was declared when it was discovered that certain jurors were reading newspaper accounts of the trial. In the present 27.26 proceeding, after an unrestricted hearing, the court found these issues with respect to counsel against appellant, that is the court found that failure to appoint counsel at any preliminary stage of the cause or during his interrogation by police and prison authorities had not infringed any of appellant's constitutional rights and that finding is convincingly supported by the record. State v. Donnell, Mo., 430 S.W.2d 297; Crosswhite v. State, Mo., 426 S.W.2d 67. As a matter of fact appellant's interrogation in connection with the prison riot and Donnell's slaying is more appropriately considered in connection with his assertion of involuntary confession.

There is a threefold assignment of error in this respect, neither of which would necessarily result, as the appellant seems to think, in his exoneration and release from imprisonment. It is first urged in general terms that the court erred in admitting in evidence exhibit 16, his own handwritten confession. It is said that its admission deprived appellant "of his liberty without due process of law." This allegation is not a briefed and argued point; in connection with it, however, it is contended that the court's

procedure for determining voluntariness "did not comport with the minimum standards" of due process in that "no specific finding of voluntariness was made by the judge prior to submitting the issue to the jury." In the second place it is said that under the evidence "the alleged confession was coerced, involuntary, and taken in violation of the defendant's Constitutional rights," meaning presumably, that upon the record the confession was involuntary as a matter of law. A third and connected point is that the instruction submitting the issue to the jury was erroneous "by failing to properly instruct the jury on the Constitutional standards to be used in making their determination as to the voluntariness" of the confession. The latter point is not too clear—in some aspects it would seem to say that a question of law should have been submitted to the jury. In the argument of this contention, presented as a separate point, it is said that the jury was given an "unconstitutional standard." At another point it is said that the instruction failed to include or submit "mental coercion or duress" and, therefore, under State v. Williams, Mo., 369 S.W.2d 408, was prejudicially erroneous. Thus the complete gamut of involuntary confessions is sought to be invoked one way or another.

It is necessary at this point and as to all claims of involuntary confession to have some understanding of the record and the context and manner in which they arose. In this case, in addition to all other motions, there was a separate motion to suppress "any and all statements," oral or written, that Stidham may have made for the specified reason that the "alleged statements were involuntary and *as a result of physical force and threats of physical force applied against this defendant* by police officers of the City of St. Louis, guards of the Missouri State Penitentiary and officers of the Missouri Highway Patrol." (Emphasis sup-

plied.) That motion was filed on December 14, 1954, and the record recites that it was overruled on December 20, 1954. That motion was filed and passed on while the cause was pending in Cole County and it does not appear just what if any evidence was heard before the court passed on the motion. Thereafter, when in the course of the trial in July 1955 it appeared for the first time from the testimony of a highway patrol sergeant that Stidham's oral and written confessions were to be employed defendant's counsel, even in 1955, and unlike in State v. Williams, "moves the Court to conduct a preliminary examination and asks the Court to inquire into the voluntariness of the statement, and to determine whether the statement was given voluntarily, either the oral or the written statement." Thereupon the court interrupted the trial and out of the jury's presence and hearing conducted a hearing on appellant's motion.

Highway patrol officers, St. Louis police, prison officials and all others present when Stidham's statements were made or given were examined at length and in detail as to the circumstances in which they were given. It is not necessary to detail the circumstances, Stidham in testifying upon the trial and the motion said that after he was taken to the field house in the recreation area where the investigation into the riot and, incidentally, Donnell's murder, was being conducted, he was handcuffed, "a rope (was fastened) between the handcuffs * * * I was lifted up in the air where all my weight had to bear on my two arms." He said that the police officers and patrol officers, fifteen to twenty, left him thus suspended from the ceiling for fifteen minutes and then because he refused to give a statement they again lifted him up and beat him with cork ball bats until he passed out. And, he said, that as a result of this treatment "I agreed to write a statement that they dictated to me."

And so after his oral statements and despite his paralyzed arm he wrote the statement and the officers, unspecified, forced him to sign it.

[6-8] Contrary to Stidham's testimony the several officers who took part in the interrogation, accounted for Stidham's presence, every minute of time, and his treatment from the time on September 22nd he was moved from Death Row to O-Hall and finally on September 27th when he was escorted from O-Hall to the recreation area and his interrogation which lasted less than thirty minutes. Incidentally Stidham was confined in solitary in Death Row as punishment and for safekeeping because of an attempt to escape the previous January. Creighton was likewise an incorrigible and confined in Death Row, a maximum security area, as punishment. And the inference is that Donnell, thought by the prison population in general and Stidham and his friends in particular to be a snitch was confined there for his personal safety. In any event, the officers, one by one, denied the use of force, threats or violence. Donnell was murdered on September 22nd and the officers say that except in passing Stidham was not questioned until he gave the statements on September 27th. He claims, however, that when he was moved to O-Hall he was placed in a bare cell, without running water, that the windows were broken and he was only allowed "to keep a pair of pants and shoes on" and he said that he was not "giver any food or water for three days." All of this testimony was denied by the prison authorities even though during a part of the time order had not been restored and some buildings were still burning. Without narrating even briefly, the testimony in contradiction of Stidham's uncorroborated claims was all but overwhelming and even giving some credence to his version the circumstances do not approach those of Brooks v. Florida, 389

U.S. 413, 88 S.Ct. 541, 19 L.Ed.2d 643, which "case documents a shocking display of barbarism." And again, after overruling the latter motion to suppress, all these witnesses testified to the same facts and circumstances and upon this testimony the issue of voluntariness was submitted to the jury. There was in point of fact upon the trial of the cause no claim of mental coercion, the claim was that the oral and written confessions were obtained by physical force and violence. And this is what Mr. Hennelly argued to the jury, it was not until his 27.26 hearing, thirteen years later, that there was a claim of mental duress. In these circumstances, as upon the original appeal, the then conventional instructions on voluntary confession were not prejudicially erroneous. State v. Laster, 365 Mo. 1076, 293 S.W.2d 300; State v. Stidham, Mo., 305 S.W.2d l. c. 16-18.

[9] In view of the insistent argument one other matter should be noted. In addition to his oral statements this is Stidham's confession, admittedly written by him:

> "Kenton held Donald while Laster stabbed him several times with a ice pick, at the same time I slashed at him three or four times around the face and neck with a knife that Kenton gave me when he opened the door, when Donald fell to the floor Linder and Thompson each said get Donald with the sledge and they proceeded to hit him with a sledgehammer and crowbar; during this time someone was holding a flashlight that Kenton previously had. When we left the cell Donald was lying on his back with his head pointed toward the door. The knife I had was a regular kitchen knife about six or seven inches in length, when I got back upstairs in B-Hall, I threw the knife on the floor near the west end on the south side of the building."

In this statement, according to the appellant, there are three errors which he says demonstrate that the six officers signing as witnesses dictated the statement thus conclu-

sively establishing that the statement was not voluntary. The statement recites his age as 25 when in fact, as shown by his birth certificate, he was 28. His residence was given as Kansas City when in fact he had not lived there and, three, although not to be found in the statement that he was credited with three prior felony convictions when in fact he had but two—one, he says, having been "nullified." The officers all say that they had no personal knowledge of these items except as Stidham wrote them in his statement. And to further confuse this issue when he was in the medical center in Springfield the documents he introduced in evidence show that in two instances he gave his age as 32. If these details are of any significance upon the issue of voluntariness it could be pointed out that in the statement Creighton's name is misspelled "Crayton" and repeatedly Donnell's name is misspelled "Donald" and he does not claim that the officers directed him to thus misspell these names. And more significantly as to the slaying of Donnell, the statement says that "Paul Kenton unlocked my door" but upon his 27.26 hearing, years later, he says "It was some colored fellow. I don't remember who it was. I think it was Ford." Thus not only is there a direct conflict in the testimony, upon the appellant's own version there looms a large credibility gap. And in this connection, by the time Stidham was brought to the interrogation center on the 27th of September there was but little point in obtaining a statement, let alone a confession, from him. By that time the guards had all been released from the rioters' custody and the cells, particularly Mr. Dietzel, and they along with Stidham's co-defendants had supplied all the details of the riot as well as the killing of Donnell. By the time Stidham gave his statements there was no mystery as to Donnell's death or as to Stidham's part in it and upon this record the statement played but little if any part in his conviction.

All that has gone before in this opinion is but background and preliminary to appellant's principal claim that the trial of his case, particularly as to his oral statements and his confession, does not meet the standards of Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908; Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895; Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; Brooks v. Florida, supra, and numerous other landmark federal cases concerned with the subject of voluntary confessions. It is not necessary here to attempt an explication of these cases, that has been done several times and their mere citation indicates an awareness of their significance and controlling force. One of the latest explications of these and numerous other cases is Parker v. Sigler, 413 F.2d 459 and it is sufficient here to say that the interpretation of the Eighth Circuit Court of Appeals is accepted.

[10] The first and basic weakness of appellant's presentation is his failure to recognize that unlike Jackson v. Denno this jurisdiction does not apply or follow the so-called New York rule in determining the voluntariness or involuntariness of confessions, Missouri employs the so-called Massachusetts procedure "impliedly approved in Jackson v. Denno," State v. Washington, Mo., 399 S.W.2d 109, 114. Upon the trial of this case, after the appellant's motion and the indicated hearing before the court, out of the jury's hearing, the court made this order: "* * * it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opin-

ion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that *the statement is and should be admissible in evidence.*" Only a single word is missing, the court unfortunately did not in the italicized clause employ the word "voluntary," nevertheless, the meaning and intent are implicitly plain. "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." Sims v. Georgia, 385 U.S. 538, 544, 87 S.Ct. 639, 643, 17 L.Ed.2d 593, 598. It is not necessary to again detail the conflicting evidence and demonstrate, as indicated from even a brief recitation upon the "totality of the circumstances" (Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423) the judge's finding of voluntary confession, prior to submission to the jury, was indeed supported by cogent and convincing testimony. State v. Hester, Mo., 1425 S.W.2d 110; Crosswhite v. State, Mo., 426 S.W.2d 67; State v. Williams, Mo., 416 S.W.2d 956; State v. Glenn, Mo., 429 S.W.2d 225.

And if this does not suffice, thirteen years later, upon the 27.26 hearing the appellant was again given full opportunity to attack the previous finding and record and he did so but the court on change of venue found the issues against appellant. It may be interpolated that upon the latter hearing he for the first time attempted to inject the issue not alone of a confession produced by "police brutality" but of mental duress and coercion. But here he attempts to connect the murder of Donnell and the events of September 22 and 27, 1954, with his prior confinement and general treatment for infraction of rules and attempt-to-escape events and treatment completely disassociated with the riot and slaying. Needless to say, these are "scarcely factors of involuntariness in a plea." Verdon v. United States, 8 Cir., 296 F.2d 549, 552. But again and

upon this issue and in the new 27.26 hearing the patrol, police and prison officials were again called, including Patrolman Barton whom Stidham had accused as one of his tormentors and he denied that he ever at any time interrogated or handled Stidham, although he had talked to Creighton, Trout, Laster, Noble, Hoover, DeLapp and Vidauri. In any event all these witnesses, all produced by the state, categorically or implicitly refuted all of Stidham's claims of mistreatment, either physical or mental. And upon this new hearing and record another circuit judge made another complete finding of law and fact. The court found, citing the Glenn and Washington cases, supra, that Judge Randolph Weber in 1954 had "followed the correct procedure in determining the issue of voluntariness of the confession and specifically made a finding relative thereto and this Court now so finds that the correct procedure was utilized." And finally the court found, as had the previous court, that the oral and written confessions were voluntary and, needless to add, the latter finding is overwhelmingly supported and procedurally and factually the cause meets all the requirements of the federal cases and there has been no invasion of due process. Crosswhite v. State, State v. Glenn and State v. Williams, supra.

Accordingly the original judgment, State v. Stidham, Mo., 305 S.W.2d 7, is affirmed and the judgment in the 27.26 proceeding is likewise affirmed.

STOCKARD and PRITCHARD, CC., concur.

PER CURIAM:

The foregoing opinion by BARRETT, C., is adopted as the opinion of the court.

All of the Judges concur.

APPENDIX G—Opinion in: Stidham v. Swenson, Federal Habeas Corpus, Civil Action No. 18121-2

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JAMES WILLIAM STIDHAM,
Petitioner,
vs.
HAROLD R. SWENSON,
Respondent.

Civil Action No. 18121-2

Memorandum and Order Denying Petition for Habeas Corpus

(Filed May 15, 1970)

Petitioner is an inmate of the Missouri State Penitentiary serving a sentence of life imprisonment upon conviction of a first-degree murder. Petitioner filed a petition for habeas corpus asserting that his conviction is void because it was rendered without due process of law and in violation of the Fifth, Sixth, and Fourteenth Amendments.

In May, 1952 petitioner was sentenced to a 25-year term in the Penitentiary for robbery. While serving his term, he was accused and convicted in 1955 of killing another inmate, for which he was sentenced to a life term. Petitioner appealed his conviction which was affirmed by the Supreme Court of Missouri in 1957. See 305 S.W. 2d 7. In 1964 he filed a 27.26 motion to vacate his sentence which was denied without an evidentiary hearing. On appeal, the Missouri Supreme Court affirmed. See 403 S.W. 2d 616. Thereafter, petitioner filed a second 27.26 motion alleging new grounds, which was also denied without an evidentiary hearing by the trial court. The Supreme Court of Missouri reversed and remanded on appeal (415 S.W. 2d 297) and

on December 5, 1968, an evidentiary hearing was held in the St. Louis City Circuit Court. This hearing resulted in a denial of relief under the 27.26 motion, which judgment was appealed to the Supreme Court and consolidated with another appeal for hearing by the court en banc. The Supreme Court on February 9, 1970 affirmed the decisions of the lower courts. 449 S.W. 2d 634.

Petitioner then filed a petition for habeas corpus in this Court, and on March 2, 1970, a show cause order was issued, since it appeared that petitioner had exhausted his available state remedies and might have stated a violation of one or more of his federally protected rights. The respondent filed with this Court, in response to the show cause order, the transcripts of the records on appeals (Missouri Case Nos. 45537 and 54674), briefs and arguments of the parties, and the opinions of the Supreme Court of Missouri. It appears to the Court that this record is complete and that it fully demonstrates that the petitioner has exhausted his available state remedies.

The petitioner alleges seven grounds for relief: (1) that he was tried and convicted upon a charge of conspiracy which was not included in the indictment; (2) that he was deprived of assistance of counsel at two critical stages of his trial; (3) that he did not knowingly or competently waive the assistance of counsel at any stage of the proceedings against him; (4) that certain members of the Missouri State Highway Patrol and personnel of Missouri State Penitentiary exerted physical and mental punishment upon him to secure a confession from him; (5) that the trial judge admitted the confession into evidence without first making a clear and specific finding that the said confession was voluntary; (6) that Instruction No. 6 given at the trial did not fully set out the constitutional standards for the jury's guidance to determine the voluntariness of the said con-

fession; and (7) that the State of Missouri knowingly used perjured testimony of two convicts to obtain the conviction of petitioner.

The facts are fairly well set out in *State* v. *Stidham*, 305 S.W. 2d 7. Very briefly, in 1952 petitioner was sentenced to 25 years' imprisonment for his part in the armed robbery of Grapette Bottling Company in Joplin, Missouri. (See *State* v. *Stidham*, 258 S.W. 2d 620.) On October 3, 1955, after a jury verdict of guilty, petitioner was sentenced to life imprisonment for his participation in the murder of a fellow inmate, Walter Donnell, on September 22, 1954, during the riot of 800 prisoners in the Missouri State Penitentiary.

Petitioner's first contention is that the state was allowed to prove and the jury instructed upon the charge of conspiracy to murder which was not included in the indictment. The indictment did not charge conspiracy; but it did charge seven persons with the murder of Donnell. Even though petitioner and the other named defendants were granted severances, the indictments in each trial named all seven of them. Further, the evidence showed that the defendants had acted in concert. An objection was leveled against Instruction No. 4 because it hypothesized that each had entered into a conspiracy and had acted in concert and "aided, abetted, assisted or encouraged" in the slaying. Under Missouri law all persons who are guilty of acting in concert in the commission of a felony are considered principals and are charged, tried, convicted and punished in the same manner. (See V.A.M.S., § 556.170.) There is no merit to the claim that murder and conspiracy to commit murder (which was in fact accomplished) are such different charges that petitioner could not have been prepared to defend himself. Furthermore, there is direct authority for instructing and proving a con-

spiracy to commit murder under an indictment charging first-degree murder. *State* v. *Holloway*, (Mo. Sup.) 195 S.W. 2d 662 (cited by the Missouri Supreme Court) states:

> (P)roof that appellant and others conspired together to commit an unlawful act and that the killing occurred in furtherance of the conspiracy may be shown under an indictment or information charging first degree murder only.

Petitioner next contends that he was deprived of effective assistance of counsel at two critical stages of his trial and that he did not knowingly or competently waive such assistance at any time. These times were while he was being interrogated by the police and at his first arraignment.

Factually, there were two arraignments. The first was instituted by the prosecuting attorney on an information in the magistrate court. There petitioner demanded counsel, and shouted out in the courtroom for counsel, but his request was denied. A plea of not guilty was entered for petitioner. Preliminary hearings were held as required by V.A.M.S., § 544.250. Petitioner was later rearraigned on an indictment returned by the grand jury of Cole County, and at that time counsel was appointed for him. Petitioner contends that this late appointment of counsel resulted in the denial of effective assistance of counsel under the standard of *Powell* v. *Alabama*, 287 U.S. 45.

The failure to appoint counsel at interrogation has been established as a denial of due process by *Escobedo* v. *Illinois*, 378 U.S. 478, and *Miranda* v. *Arizona*, 384 U.S. 436. However, these cases are not retroactive (*Johnson* v. *New Jersey*, 384 U.S. 719) and do not control here.

The more serious question concerns the failure to appoint counsel at the time of the first arraignment, which

petitioner claims resulted in denial of due process. Petitioner cites *Hamilton* v. *Alabama*, 368 U.S. 52, *White* v. *Maryland*, 373 U.S. 59, and *Arsenault* v. *Massachusetts*, 393 U.S. 5, as authority. The Missouri Supreme Court in their opinion 449 S.W. 2d 634 distinguished the latter two cases by stating that "(t)here is no factual similarity in this and any of the cited cases . . . (citing *White* v. *Maryland, supra*, and *Arsenault* v. *Massachusetts, supra*) in which there were pleas of guilty at the preliminary or 'at a probable cause hearing' and the pleas were introduced in evidence upon jury trials." However, in *Hamilton* v. *Alabama*, from which the holdings in *White* and *Arsenault* were drawn, the petitioner, at arraignment without counsel being appointed, pled not guilty. The Supreme Court held that the arraignment is a critical stage in a criminal proceeding, and the failure to appoint counsel to represent the defendant at that time is a denial of due process. The court stated at page 55:

> When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. (Citing cases.) In this case . . . the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.

The respondent and the Missouri Supreme Court opinion state that no infringement of rights occurred for two reasons. The first is that "There is neither claim nor proof that anything done or said at any preliminary hearing or in any medical or mental examination was employed against [Stidham] or that the state even secured any relevant information." (448 S.W. 2d at 639.) More decisive, according to the court, is the fact that Stidham was not prosecuted by information (under which the preliminary hearings had been held) but rather by an indictment re-

turned on November 23, 1954. "Thus there was no occasion or place for a preliminary hearing." Petitioner, along with his six co-defendants, were arraigned under the information on September 29, 1954; the information was dismissed and the indictment was returned on November 23, 1954. On this date counsel was appointed, and petitioner was rearraigned with the presence of counsel on December 6, 1954.

The important question is whether the arraignment and preliminary hearing are critical stages in the proceedings in Missouri. Under Missouri law, a defendant is not required to assert any right, plea or defense at the arraignment in order to preserve any statutory or constitutional rights. (V.A.M.S., § 546.020) Moreover, all rights, pleas or defenses are preserved inviolate. In *State* v. *Benson,* (Mo. Sup.) 415 S.W. 2d 773, it was held that the absence of counsel during arraignment is not, per se, a violation of the Sixth Amendment. In *Madison* v. *Tahash,* (C.A. 8) 359 F. 2d 60, the court held that the arraignment was not a critical stage of the criminal proceedings in Minnesota. *Donnell* v. *Swenson,* (W.D. Mo.) 302 F. Supp. 1024, extended the *Tahash* holding to cover arraignments in Missouri.

In *State* v. *Patrick,* (Mo. Sup.) 420 S.W. 2d 258, the preliminary hearing was held not to be a critical stage. This view is also supported by *Pope* v. *Swenson,* (C.A. 8) 395 F.2d 320, 322, in which the court stated, "We agree that denial of counsel at the preliminary hearing under Missouri law was not a constitutional infirmity in Pope's conviction, where the defendant pleaded not guilty and was otherwise not shown to have been prejudiced." See also *Nolan* v. *Nash,* (C.A. 8) 316 F. 2d 777; Cf. *Burnside* v. *State of Nebraska,* (C.A. 8) 346 F. 2d 88; *Holland* v. *State of Nebraska,* (C.A. 8) 416 F. 2d 1007.

Petitioner in this case did not plead, and, pursuant to V.A.M.S., § 546.020, a plea of not guilty was entered for him. At the second arraignment, petitioner pleaded not guilty, was furnished a copy of the indictment and, upon his request for a certain lawyer, the court appointed that attorney who represented him thereafter. Petitioner raises no complaints about the efforts of the attorney in his behalf. Petitioner has not shown that he was deprived of any rights by the failure to appoint counsel at the first arraignment, and, therefore, in line with the Eighth Circuit Court of Appeals, we hold that the failure to appoint counsel at that time was not a deprivation of rights.

Petitioner further asserts that the state knowingly used perjured testimony of two witnesses against him. The state used two prison inmates, Herman Trout and James Creighton, to testify; as proof of perjury, petitioner states that both prisoners had their sentences commuted and were released from prison on the same day.

In making such an allegation, the burden of proof is on petitioner to show both that the testimony was perjured and that such testimony was knowingly and intentionally used by the prosecuting attorney in order to obtain a conviction. *Anderson* v. *United States,* (C.A. 7) 403 F. 2d 451; *Smith* v. *State of Florida,* (C.A. 5) 410 F. 2d 1349, and cases cited therein; *Enzor* v. *United States,* (C.A. 5) 296 F. 2d 62; *United State* v. *Jenkins,* (C.A. 3) 281 F. 2d 193. The petitioner has not met this test. His allegations and the record are devoid of any proof of perjury or willful use of perjury by the state. Furthermore, petitioner concedes that he has no direct proof, but contends that the circumstantial evidence, that of commutation of sentence less than six months after Stidham's trial, is sufficient proof to indicate perjury in line with *Napue* v. *Illinois,* 360 U.S. 264. That case is not controlling here because there

was express proof of a "deal" between the prosecutor and witness in the case. Here there is no such proof.

Petitioner's three remaining contentions relate to the issue of voluntariness of his confession. He asserts that he was coerced by physical and mental punishment to confess, that the confession was admitted without a finding by the trial judge that it was voluntary, and that the instruction given at the trial did not fully set out the constitutional standards for the jury's guidance in determining the issue of voluntariness.

In regard to petitioner's first allegation, he relies mainly upon the cases of *Clewis* v. *Texas*, 386 U.S. 707, and *Davis* v. *North Carolina*, 384 U.S. 737. Both cases use the criterion of "totality of circumstances" in determining whether the confessions were voluntary. The respondent and the Missouri Supreme Court opinion lend little credence to Stidham's testimony because "Without narrating even briefly, the testimony in contradiction of Stidham's uncorroborated claims was all but overwhelming . . ." This not unexpected. The Supreme Court in both *Clewis* and *Davis, supra*, commented, "As is almost invariably so in cases involving confessions obtained through unobserved police interrogation, there is a conflict in the testimony as to the events surrounding the interrogation."

It is necessary to review the uncontroverted facts in order to determine this issue. The murder was committed on September 22, 1954 and Stidham confessed on September 27, 1954. He was questioned intermittently up until that time concerning his part in the murder. He had very little food and very little sleep. At no time during this period was he informed of his right to counsel or to remain silent. In fact, he asserts that an attempt to get an attorney was thwarted when the prison authorities refused to allow a letter to be mailed. On the 27th, Stidham was

taken to the Athletic Building and questioned by a number of officers who had hand guns and riot guns in their possession. Stidham asserts that he was physically abused and rendered unconscious at this time, and these acts resulted in his confession. Before and after the interrogations Stidham was in solitary confinement and no visitors, including parents or priest, were allowed to see him. Other uncontradicted facts indicated that Stidham was deprived of food for two days after his confession and that he lost 25 pounds during the period of interrogation.

He had consistently denied all involvement in the murder up until the time of his confession.

The most damaging of the factors considered in the totality of the circumstances is the failure to inform petitioner of his rights. *Miranda* v. *Arizona*, 384 U.S. 436, has been determined not to be applicable retroactively. (See *Johnson* v. *New Jersey*, 384 U.S. 719.) However, it still remains that the failure to inform is a significant factor in determining the issue of voluntariness, although it is insufficient in itself to require the voiding of the confession. Wholly apart from the disputed facts, the statement of facts established by the record and as found at Stidham's 27.26 evidentiary hearing do not lead to the conclusion that such pressures were applied to Stidham as to result in overcoming his will to maintain his innocence.

Petitioner next attacks the procedure used by the trial court in determining the voluntariness of the confession, alleging that it is in violation of *Jackson* v. *Denno*, 378 U.S. 368. In that case, a constitutional rule was established that a jury was not to hear a confession unless and until the trial judge had determined that it was freely and voluntarily given. In *Sims* v. *Georgia*, 385 U.S. 538, the court further extended this holding at page 544:

The rule allows the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of a defendant but it is not for the jury to make the primary determination of voluntariness. Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity.

Here, in accordance with a request of Stidham's counsel, the trial court conducted a preliminary examination inquiring into the voluntariness of the confession outside of the hearing of the jury. Witnesses were called and cross-examined. This hearing satisifed the requirement of *Jackson* v. *Denno, supra,* that there be a (1) reliable nonjury preliminary or post conviction determination of the issue of voluntariness, (2) uninfluenced by the truth or falsity of the confession (3) by procedures "fully adequate to insure a reliable and clear-cut determination, including the resolution of disputed facts upon which the voluntariness issue may depend."

At the conclusion of the testimony, the court made the following statement:

THE COURT: Now, at the conclusion of the hearing held outside of the hearing of the Jury, the request by the Defendant for a hearing upon the statement which has been identified as—

MR. RILEY: 16 and 16-1.

THE COURT: 16 and 16-1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the

> Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted, so we may proceed with Sergeant Little, as to his identification before the Jury of the statement in question, Exhibit 16 and 16-1.
>
> MR. HENNELLY: In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?
>
> THE COURT: That is right. Mr. Sheriff will you bring the Jury back in?

If the trial court had simply stated that he found the confession was voluntarily made after hearing the many witnesses who testified on this score, the matter would have been settled and this point could not be raised in this Court. There are many cases holding that a ruling by the Court that the evidence heard "makes a jury issue of the matter," or words of similar import, do not satisfy the rule of *Jackson* v. *Denno, supra.* And so the precise question presented here is whether the Court did find the confession involuntary or whether he failed to rule on that point and decided to let that question be decided by the jury.

The evidence in this case on behalf of the defendant, which the judge heard, was that he was subjected to brutal physical torture to induce the confession. If the judge had believed even a part of his testimony, he would have undoubtedly held the confession involuntary. The trial court held a full-scale evidentiary hearing on the voluntariness of the confession, and without actually using the word voluntary, directly held that he believed the state's witnesses and did not believe the defendant's testimony. This reasoning was supported by the direct ruling that he was denying the request of defendant's counsel to hold that the contested statement was involuntary.

It would be highly technical, in this day and age, to hold that the word "voluntary" was a word of art and, in its absence, a conviction by a jury, after a long trial, should be set aside because the judge ruled the statement was not involuntary instead of ruling that the statement was voluntary. It is the opinion of this Court that the statements and action of the judge does clearly indicate a finding of voluntariness, and is sufficient under the teachings of *Jackson* v. *Denno, supra,* and *Sims* v. *Georgia, supra.*

The petitioner's third attack is related to the second. Basically, he contends that since the judge made no specific finding of voluntariness, his instruction which did not require them to make a specific finding on the voluntariness of the confession was violative of *Jackson* v. *Denno, supra.* Since we have held that the trial court reliably determined the issue of voluntariness, it was not necessary for the jury to make a specific finding thereon.

Therefore, it is

ORDERED that the petition for habeas corpus be, and hereby is, denied.

/s/ Wm. R. Collinson
District Judge

APPENDIX H—Order Dismissing Appeal, Stidham v. Swenson, No. 20337 Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1969

James William Stidham,
Appellant,
vs.
Harold R. Swenson, Warden, Missouri State Penitentiary.
No. 20337

Appeal from the United States District Court for the Western District of Missouri.

Motion of appellant to dismiss the appeal from the United States District Court for the Western District of Missouri in this cause having been filed, and in pursuance of said motion,

It is now here ordered and adjudged by this Court that the appeal from the said District Court in this cause be, and the same is hereby, dismissed without prejudice.

And it is further ordered that the mandate in this cause issue forthwith to the said District Court.

June 24, 1970

APPENDIX I—Order of United States District Court Dismissing Reinstated Appeal in Stidham v. Swenson, No. 20337

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1969

James William Stidham, Appellant,

vs.

Harold R. Swenson, Warden, Missouri State Penitentiary.

No. 20337

Appeal from the United States District Court for the Western District of Missouri.

Judgment of this Court dismissing the appeal in this cause from the United States District Court for the Western District of Missouri was entered June 24, 1970. Our mandate issued to the aforesaid District Court on that date. The case now comes before the Court on consideration of appellant's motion to reinstate the appeal on our docket. Being fully advised in the premises, it is now here ordered that the motion be, and it is hereby, denied.

October 14, 1970

APPENDIX J—Opinion of the United States District Court in Stidham v. Swenson, No. 18771-2

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JAMES WILLIAM STIDHAM,
Petitioner,
vs.
HAROLD R. SWENSON,
Respondent.
} Civil Action No. 18711-2

Order Granting Leave to Proceed in Forma Pauperis and Denying Petition for Habeas Corpus

(Filed November 5, 1970)

On February 18, 1970, Stidham filed a petition for habeas corpus which was denied by this Court by order entered on May 15, 1970. *Stidham* v. *Swenson*, Civil Action No. 18121-2. Stidham filed a notice of appeal and a request for certificate of probable cause which was granted, along with leave to appeal in forma pauperis. On June 25, 1970, the Eighth Circuit Court of Appeals granted Stidham's motion to dismiss the appeal. At that time the Clerk of the Court informed Stidham that if he intended to renew his claims, he had to proceed anew in the district court.

On September 25, Stidham filed another petition for habeas corpus in this Court in which he by reference to his prior petition stated identical grounds for relief. Shortly before or at the same time he filed a motion to reinstate the appeal in the Court of Appeals, despite the instructions given to him when his appeal was dismissed. The Court of Appeals denied his motion.

The pertinent facts are set out in the order denying the petition for habeas corpus in Civil Action No. 18121-2

and need not be restated here. In that petition, Stidham stated seven grounds for relief, which were: (1) that he was tried and convicted upon a charge of conspiracy which was not included in the indictment; (2) that he was deprived of assistance of counsel at two critical stages of the proceedings against him; (3) that he did not knowingly or competently waive the assistance of counsel at any stage of the proceedings; (4) that certain members of the Missouri State Highway Patrol and personnel of the Missouri State Penitentiary exerted physical and mental punishment upon him to secure a confession from him; (5) that the trial judge admitted the confession into evidence without first making a clear and specific finding that the said confession was voluntary; (6) that Instruction No. 6 given at the trial did not fully set out the constitutional standards for the jury's guidance to determine the voluntariness of the said confession; and (7) that the state knowingly used perjured testimony of two convicts to obtain the conviction of petitioner.

By amendment to this petition herein, Stidham states an additional ground for relief, alleging that he was denied the right to confront and cross-examine a state's witness whose testimony as to certain implicating statements was objected to, the objection sustained, but the jury not instructed to disregard.

In regard to Stidham's seven allegations which are raised here for the second time and upon which this Court denied relief in the prior petition (18121-2), it is unnecessary to restate our findings, and we readopt them here. However, one point—that he was denied counsel at arraignment and preliminary hearing—does merit further consideration.

Factually, there were two arraignments. The first was instituted by the prosecuting attorney on an informa-

tion in the magistrate court. Although Stidham demanded counsel at that time, none was appointed. A plea of not guilty was entered for him. (V.A.M.S., § 546.020) Preliminary hearings were held as required by V.A.M.S., § 544.250. The information was later dismissed, and Stidham was arraigned again on an indictment returned by the Grand Jury of Cole County. At that time counsel (whom he had requested) was appointed for him. In the prior civil action (18121-2), we held that Stidham was not entitled to relief because the arraignment and preliminary hearing have been held not to be critical stages in Missouri. *State* v. *Benson,* (Mo. Sup.) 415 S.W. 2d 773; *State* v. *Patrick,* (Mo. Sup.) 420 S.W. 2d 258; *Madison* v. *Tahash,* (C.A. 8) 359 F. 2d 60; *Donnell* v. *Swenson,* (W.D. Mo.) 302 F. Supp. 1024; *Pope* v. *Swenson,* (C.A. 8) 395 F. 2d 320; *Nolan* v. *Nash,* (C.A. 8) 316 F. 2d 777.

Subsequent to our opinion in the prior habeas corpus action, the Supreme Court handed down *Coleman* v. *Alabama,* 399 U.S. 1, in which it was held that a preliminary hearing is a critical stage of a criminal proceeding, that counsel was essential to protect the accused against any erroneous or improper prosecution, and that the right of counsel under the Sixth Amendment is applicable to such proceedings.

Coleman was decided on June 22, 1970. The arraignment and preliminary hearing in question here occurred in 1955. Assuming, but not deciding, that *Coleman* would apply to the fact situation here, it must be determined whether or not *Coleman* is to be applied retroactively. Although the Supreme Court has not rendered a decision on this point, the Eighth Circuit Court of Appeals has expressly held that *Coleman* is not retroactive. *Konvalin* v. *Sigler,* (C.A. 8) No. 19731 (decided September 22, 1970, not yet reported). Therefore, in line with our controlling

court, we hold that *Coleman* does not apply retroactively to this situation.

Stidham's latest contentions are that he was denied the right to confront and cross-examine one Officer Eitzman who "testified before the jury and judge that he took statements implicating petitioner in the murder he was on trial for;" and that the testimony of Eitzman in regard to these implicating statements was objected to, the objection sustained, but the jury was not instructed to disregard it.

Stidham claims that he exhausted his state remedies in regard to these contentions because the Missouri Supreme Court decided them adversely to him on his direct appeal. *State* v. *Stidham,* 305 S.W. 2d 7. However, a review of that case shows that Stidham did not raise the issue that he was denied the right to confront and cross-examine Officer Eitzman in regard to alleged implicating statements. Nor was the issue raised in any of Stidham's appeals to the Missouri Supreme Court from denials of his 27.26 motions. See *State* v. *Stidham,* (Mo. Sup.) 403 S.W. 2d 616; 415 S.W. 2d 297; 449 S.W. 2d 634. Since Stidham does have presently-existing and adequate state remedies to raise this contention, the contention must be dismissed without prejudice. See 28 U.S.C. § 2254; *Fay* v. *Noia,* 372 U.S. 391.

In his direct appeal from his conviction, Stidham did allege that the trial court should have instructed the jury to disregard the testimony of Eitzman in regard to implicating statements, after sustaining an objection to it. The Missouri Supreme Court found the issue in favor of the state.

The objected-to testimony of Eitzman was as follows: "I had talked to him and explained to him that I had a statement—" (Tr. 508). The trial court sustained the ob-

jection to what Eitzman told Stidham; ruled that the witness was not to testify or be asked what statements he made, or what statements he had from other parties; and determined that the jury did not need to be instructed to disregard because nothing damaging had been said when the defense halted the testimony by its objection. (Tr. 508-511)

There does not appear to be a denial of a federally-protected right by the trial court's determination not to instruct the jury to disregard Eitzman's incomplete remark. Therefore, no relief can be granted by this Court.

For the foregoing reasons, it is

ORDERED that leave to proceed in forma pauperis be, and it is hereby, granted; and

ORDERED that the petition for habeas corpus be, and it hereby is, denied.

/s/ Wm R. Collinson
District Judge

APPENDIX K—Opinion of the Eighth Circuit Court of Appeals in Stidham v. Swenson, No. 20685

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,685

James William Stidham,
Appellant,

v.

Harold R. Swenson, Warden,
Appellee.

} Appeal from the Judgment of the United States District Court for the Western District of Missouri Denying Appellant's Petition for the Writ of Habeas Corpus.

[May 24, 1971.]

Before GIBSON, HEANEY and BRIGHT, Circuit Judges.

HEANEY, Circuit Judge.

On September 22, 1954, an inmate of the Missouri State Penitentiary was beaten and stabbed to death by fellow inmates during a riot in that institution. An investigation was undertaken by the prison authorities immediately after the quelling of the riot. Written confessions were eventually obtained from several inmates, including James William Stidham. Stidham's confession was used against him in his 1955 trial in state court in which he was convicted of first degree murder.

Stidham made a number of attempts to obtain relief in Missouri courts on the ground that the trial judge did not find his confession to be voluntary, as required by *Jackson* v. *Denno*, 378 U.S. 368 (1964),[1] before submitting it to the jury. *State* v. *Stidham*, 305 S.W.2d 7 (1957); *State* v. *Stidham*, 415 S.W.2d 297 (1967); *State* v. *Stidham*, 449 S.W.2d 634 (1970). He was unsuccessful in each attempt.

On November 9, 1970, a habeas corpus petition brought by Stidham was denied by the United States District Court for the Western District of Missouri. The District Court found (1) that the trial court which initially tried Stidham had complied with *Jackson*, and (2) that on the basis of the undisputed facts adduced at the state trial and the subsequent state evidentiary hearing, the confession was voluntary. Stidham appeals from the denial.[2]

COMPLIANCE WITH JACKSON

At the initial trial, the state court heard evidence outside the presence of the jury on the voluntariness of the confession. At the conclusion of the hearing, the trial court stated:

> "* * * [I]t is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant

1. *Jackson* v. *Denno*, 378 U.S. 368 (1964), is retroactively applicable. *Desist* v. *United States*, 394 U.S. 244 (1969); *Parker* v. *Sigler*, 413 F.2d 459 (8th Cir. 1969), *rev'd on other grounds*, 396 U.S. 482 (1970).

2. Stidham also contends on appeal that he was denied assistance of counsel at two critical stages of his trial, that he was tried and convicted on a charge not included in his indictment and that the State of Missouri knowingly used the perjured testimony of two convicts in obtaining his conviction. We affirm the decision of the District Court on each of these issues for the reasons given in that court's memorandum opinion. *Stidham* v. *Swenson*, Civ. No. 18121-2 (W.D. Mo. May 15, 1970).

has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted * * *

"MR. HENNELLY [Defendant's counsel]: In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?
"THE COURT: That is right. * * *"

The United States District Court found that this ruling comported with the requirements of *Jackson* v. *Denno*, *supra*, stating:

> "It would be highly technical, in this day and age, to hold that the word 'voluntary' was a word of art and, in its absence, a conviction by a jury, after a long trial, should be set aside because the judge ruled the statement not involuntary instead of ruling that the statement was voluntary. It is the opinion of this Court that the statements and action of the judge does clearly indicate a finding of voluntariness, and is sufficient under the teachings of Jackson v. Denno, supra, and Sims v. Georgia, [385 U.S. 538 (19...)]."

We believe that the District Court's analysis is incorrect. It assumes that Missouri law, at the time of Stidham's trial, required the trial court to find that a confession was voluntary before permitting it to be considered by a jury. Our examination of the Missouri case law convinces us that a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary.

The following statements of the Pre-*Jackson-Denno* Missouri procedure support this view:

> "* * * [W]hen there is substantial conflicting evidence and the question is close it is better to refer the underlying issue of voluntariness to the jury than to exclude the confession, since there is less chance of a miscarriage of justice by leaving the question open to a second determination, before the jury on a rehearing of the evidence under proper instructions, than by foreclosing the inquiry. The court then can still exclude the confession if it finds from all the evidence, including that introduced at the preliminary hearing, that the same was involuntary. * * *"

State v. *Gibilterra*, 116 S.W.2d 88, 94 (1938).

> "It is my view that we should adhere to the standard of admissibility of confessions of whether or not the particular confession is voluntary in fact. That has always been the rule of this Court. * * * [T]his is a jury question unless its involuntary character so conclusively appears that it must be held to be involuntary as a matter of law. * * * If the confession is voluntary in fact, and is true, the defendant's rights are not violated by putting it in evidence. Some one must determine these fact issues, and our system is to leave them to the jury, when they must be decided on conflicting evidence." (Citations omitted.)

State v. *Sanford*, 193 S.W.2d 37, 38 (1946) (concurring opinion).

> "* * * Under our system of jurisprudence it is generally left to the jury to determine whether a confession was voluntary, unless the contrary appears so conclusively that the confession must be held involuntary as a matter of law. * * *" (Citations omitted.)

State v. *Laster*, 293 S.W.2d 300, 304 (1956).[3]

---

3. See also, *State* v. *Bridges*, 349 S.W.2d 214 (1961); *State* v. *Barnett*, 338 S.W.2d 853 (1960); *State* v. *Falbo*, 333 S.W.2d 279 (1960); *State* v. *Statler*, 331 S.W.2d 526 (1960); *State* v. *Phillips*, 324 S.W.2d 693 (1959); *State* v. *Bradford*, 262 S.W.2d 584 (1953); *State* v. *Cochran*, 203 S.W.2d 707 (1947); *State* v. *Ellis*, 193 S.W.2d 37 (1946).

Our analysis of the record of Stidham's trial leads us to conclude that the trial judge in this case submitted the voluntariness issue to the jury without making a prior factual determination that the confession was voluntary. His finding, that the confession was not "involuntary as a matter of law", was not, under the then existing Missouri law, the same as finding that it was voluntary. If the trial judge does not make a *factual* determination that a confession is voluntary before submitting it to the jury, *Jackson* standards are violated. *Parker* v. *Sigler*, 413 F.2d 459 (1969), *rev'd on other grounds*, 396 U.S. 482 (1970).

The Missouri Supreme Court's treatment of this issue on Stidham's appeals buttresses our view that the requirements of *Jackson* were not met. In its first *Stidham* opinion, 305 S.W.2d 7 (1957), the court stated:

> "There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted in evidence before the State established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, *found the issue was for the jury, and later, after hearing the evidence before the jury submitted the issue to the jury for determination.* * * * On the conflicting showing the issue of the voluntariness of the confession was for the jury. * * *" (Emphasis added.)

In its most recent *Stidham* opinion, 449 S.W.2d 634 (1970), the Missouri Supreme Court examined its procedure and determined that "* * * Missouri employs the so-called Massachusetts procedure 'impliedly approved in *Jackson* v. *Denno*' * * *". In doing so, the court relied upon *State* v. *Washington*, 399 S.W.2d 109 (1966). We point out that *State* v. *Washington* was decided after *Jackson* became the law, and a comparison of its standard with those enunciated in the Missouri cases, above cited, reveals the difference between the 1955 and 1966 standards.

THE VOLUNTARINESS OF THE CONFESSION

The Supreme Court recently reemphasized that a defective procedure, standing alone, is not a sufficient basis for habeas corpus relief:

> "[Our decisions][4] did not establish that an applicant for federal habeas corpus is entitled to a new hearing on the voluntariness issue, in either the federal or state courts, merely because he can point to shortcomings in the procedures used to decide the issue of voluntariness in the state courts. Our decisions make clear that he must also show that his version of events, if true, would require the conclusion that his confession was involuntary."

Procunier v. *Atchley*, . . . U.S. . . ., 27 L.Ed.2d 524, 529 (1971).

Stidham alleges: that he was returned to his regular Death Row cell in the early evening of September 22; that between September 22 and September 27, he was questioned intermittently by police officers and state troopers who threatened him with physical harm if he did not tell everything he knew about the murder; that between September 22 and September 27, he was able only to catch short naps while sitting on the toilet because his straw tick, on the floor, was too water-logged to be slept on as a result of his cell being flooded when rioting inmates opened water pipes; that he was given nothing to eat from September 22 until September 29; that he weighed 184 pounds before the riot but only 159 pounds on September 29; that he was never informed of his *Miranda* rights;[5] that on September 27, he was taken to the prison's

4. The Court was specifically referring to *Jackson* v. *Denno*, *supra*, and *Townsend* v. *Sain*, 372 U.S. 293 (1963).

5. Since the *Miranda* decision is not retroactive, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), this allegation, even if true, is not dispositive of the case. However, failure to warn of constitutional rights is a factor properly considered in determining the voluntariness issue. *Clewis* v. *Texas*, 386 U.S. 707 (1967); *Davis* v. *North Carolina*, 384 U.S. 737 (1966).

athletic field house and questioned in the presence of six police officers armed with pistols, rifles and riot guns; that he was questioned for approximately twenty to thirty minutes, during which time he denied involvement in the murder; that, thereafter, a rope was placed through his handcuffs and he was hung up for approximately fifteen minutes with his hands behind him; that upon his continued refusal to implicate himself, he was again hung up and beaten with corkball or baseball bats until he lost consciousness; and that he then wrote out a confession which was dictated to him.

We believe that the above version of the facts, if true, requires the conclusion that the confession was an involuntary one. See, *Brooks* v. *Florida*, 389 U.S. 413 (1967); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Brown* v. *Mississippi*, 297 U.S. 278 (1936).

We emphasize that we do not decide or intimate that the allegations are true. It is not the task of the federal court to do so in state habeas corpus matters:

> "* * * [T]he appropriate remedy when a federal court finds a Jackson v. Denno error in a prior state proceeding is to allow the State a reasonable time to make an error-free determination on the voluntariness of the confession at issue. * * *"

Sigler v. *Parker*, *supra* at 484.

We only note, as did the United States District Court, that we have examined the transcripts and other relevant materials and have found that several of Stidham's allegations have not been contradicted in the record.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings consistent with the remedy provided for in *Sigler* v. *Parker*, *supra*.

GIBSON, Circuit Judge, dissenting.

I respectfully dissent. Appellant Stidham has been accorded many hearings and with the aid of extremely able and expert counsel has raised just about every objection and defense available in the well stocked arsenal of defense tactics—this he has a right to do, but I do not think the never-ending search for error, fancied or otherwise, serves the cause of criminal justice. The Courts rather than spending limited judicial resources in open end legal proceedings should give heed to the many evils engendered in the law's delay and give adherence to the constitutional mandate for speedy trials. Only by unclogging the dockets can this be done. Much has been said and written about the inordinate delays, both at the trial and appellate levels, that have burdened and made ineffective to a large extent our system of criminal justice.

I would affirm on the basis that the Missouri Supreme Court has correctly enunciated the Missouri law applied in this case at the original trial and that Court's holding that the procedure in this case was compatible with *Jackson* v. *Denno*. *State* v. *Stidham*, 449 S.W.2d 634 (Mo. 1970). A State Supreme Court is the best interpreter of its own laws. In addition, a review of the entire record of the original conviction, the record in the plenary hearing in the state post-conviction review, together with the federal post-conviction review in the federal District Court does not affirmatively demonstrate any ground for upsetting the jury verdict of 1954.

First as to the law, the preliminary inquiry into the voluntariness of the confession during the original trial of this case held by the trial judge out of the presence of the jury, I think, adequately satisfied the requirements of *Jackson* v. *Denno*, 378 U.S. 368 (1963). The failure of the trial judge to use the word "voluntary" instead of "not

involuntary" is a matter of semantics and too technical a basis upon which to upset a conviction affirmed by the highest state court. The jury is the ultimate trier of fact on the voluntariness issue if the confession is not involuntary as a matter of law. *Jackson* v. *Denno*, required a preliminary examination outside of the hearing of the jury on the issue of voluntariness. This was done.

The trial judge at the plenary preliminary hearing could only do one of two things; hold the confession involuntary as a matter of law and thus not admit it, or view it as not involuntary as a matter of law and admit it in evidence together with any evidence on the voluntariness issue that the accused wished to present. After all, the jury is the sole and only arbiter of the facts and only has to give the confession such weight as it deems merited. The trial judge could not say the confession is voluntary and instruct the jury that it must accept the confession and act accordingly.[1] The judge here made the only finding he could legally make to have the confession admitted into evidence for the jury's consideration; that is, it was admissible on the ground that it was not involuntary as a matter of law. This was a far cry from the limited and incomplete procedure condemned in *Jackson* v. *Denno*.

The argument here appears to be more a matter of semantics or technicalities than a substantial procedural defect in trial proceedings. The trial court's decision in admitting the confession was based on conflicting evidence, the same evidence that is now urged to upset the verdict and judgment of the state court. No new evidence has been adduced and we are in effect now being asked to

1. The trial judge could not tell the jury the confession was voluntary; that would constitute error in a Missouri state trial, be considered a fatal comment on the evidence and as invading the province of the jury.

review this same evidence and hold the procedure bad because the judge did not use the magic rubric "voluntary" but said in effect, as is clearly shown by the record, that the confession was admissible and not involuntary as a matter of law.[2] By refusing to hold that the confession and statements were involuntary, the Court in the context of this hearing would be holding that the confession and statements were voluntary. This particular preliminary hearing on the confession and statements was not held just to see if there was conflicting evidence, as under the New York rule held defective in *Jackson* v. *Denno*.

Second as to the facts, I agree with the majority that *Procunier* v. *Atchley*, . . . U.S. . . ., 27 L.Ed.2d 524 (.....), is not applicable to this case as the appellant would clearly be entitled to have the confession ruled inadmissible if his version of the facts is correct and, in addition, his conviction would be a travesty on justice if his version of the facts in the case is correct. The conflict of the evidence in this case carries throughout the confession and the other evidence adduced at the trial. The decision on the admissibility of the confession is solely predicated on credibility factors. The only evidence of a forced or involuntary confession comes from the mouth of the accused. All of the other evidence, including that of

2. At the conclusion of the preliminary hearing on the issue of the admissibility of the confession (and it would not be admissible if involuntary), the trial judge said,

> "It is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, * * * The defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence * * * that the statement is and should be admissible in evidence, subject to further examinations of the witnesses * * *."

And in response to appellant's counsel's question of whether he was overruling the motion and request "to hold as a matter of law that those statements were involuntary", replied "That is right."

four St. Louis, Missouri, policemen and two State Highway Patrolmen are in direct conflict with the testimony of the accused in regard to the confession. Further, testimony of the accused regarding his non-participation in the killing of Donnell is rather persuasively refuted by prison guard Dietzel and inmates Creighton and Trout, all of whose statements are consistent with the State's version of the group assault and killing of inmate Donnell.

In other words for Stidham to be innocent as claimed all of the other testimony in the case, except as to formal matters and some neutral medical testimony from the Springfield Medical Center, would have to be out and out perjury. As noted by the Missouri Supreme Court in Stidham's original appeal, *State* v. *Stidham*, 365 S.W.2d 7 (1957), the accused Stidham while taking the stand failed to controvert essential elements of the State's case and failed to adduce any corroboration for his version of the facts.[3]

The trial lasted several days and the jury after being out 1½ hours rendered a unanimous verdict of guilty. Certainly no material error affecting the integrity of the fact-finding process has been disclosed.

---

3. A reading of the record of the original trial shows the rioters made a particular effort to break through three doors to get into Death Row where Stidham was being held in solitary confinement (for infraction of prison rules—escape) for the particular purpose of releasing Stidham and then presenting him to the group as their leader. Stidham's version that he left the Death Row area immediately and went upstairs to another cell and listened on the radio while drinking coffee during all of the period of the tumultuous riot does not appear credible. Also no corroboration has been produced by Stidham either at the time of trial or since. While on the other hand three witnesses, guard Dietzel and inmates Creighton and Trout, directly controverted Stidham's version of his actions at that time and place Stidham at the scene of the crime with the other six defendants who were accused of this brutal and sadistic killing. Without detailing all of the evidence, the evidence presented aside from the confession was persuasive.

I would affirm Judge Collinson and his view that the action of the original trial judge "clearly indicates a finding of voluntariness and is sufficient under the teachings of *Jackson* v. *Denno, supra,* and *Sims* v. *Georgia, supra.*" Furthermore issues of credibility and issues of fact decided long ago should not be upset by technicalities or semantics. There appears to be no constitutional defect in the fact-finding process utilized in this case and the issue of credibility after full hearing was decided adversely to Stidham both in the original trial and at a plenary State post-conviction hearing, *affirmed* in 449 S.W.2d 684 (Mo. 1970). I would affirm the District Court's denial of relief.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX L—Order Denying Petition for Rehearing En Banc Before the United States Court of Appeals for the Eighth Circuit in Stidham v. Swenson, No. 20685

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1970

James William Stidham, Appellant,
vs.
Harold R. Swenson, Appellee.
No. 20685

Appeal from the United States District Court for the Western District of Missouri.

This appeal comes before the Court on consideration of appellee's petition for rehearing or transfer to the Court en banc. Being fully advised in the premises, it is now here ordered:

1. Petition for rehearing en banc is denied by an equally divided Court;

2. Petition for rehearing by the panel to which the case was previously submitted is denied.

June 11, 1971

Supreme Court of the United States

No. 71-224 ---, *October Term, 19*

Harold R. Swenson, Warden,

Petitioner,

v.

James William Stidham

ORDER ALLOWING CERTIORARI. Filed January 24 ---------- , 19 72.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth ----------. Circuit is granted.

FICE COPY

Supreme Court, U. S.
FILED
JAN 30 1972

VOLUME I

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-224

HAROLD R. SWENSON, Warden,
Missouri State Penitentiary,
Petitioner,

vs.

JAMES WILLIAM STIDHAM,
Respondent.

WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

APPENDIX FOR THE PETITIONER

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APPENDIX A—Transcript in: State v. Stidham,

No. 45537

[1] IN THE
CIRCUIT COURT WITHIN AND FOR THE COUNTY
OF BUTLER, STATE OF MISSOURI

STATE OF MISSOURI,)
Plaintiff,)
vs.) No. 3158
JAMES WILLIAM STIDHAM,)
Defendant.)

MURDER IN THE FIRST DEGREE

APPEARANCES:

For the Plaintiff: James T. Riley, Esq., Prosecuting Attorney, Cole County, Jefferson City, Missouri. Rex A. Henson, Esq., Prosecuting Attorney, Butler County, Duncan Building, Poplar Bluff, Missouri.

For the Defendant: Mark Murray Hennely, Esq., Attorney at Law, Suite 1832-34 Arcade Bldg., 812 Olive Street, St. Louis 1, Missouri.

[2] STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

BE IT EVER REMEMBERED, That on this the 23rd day of November, 1954, at the regular September Term, 1954, at the Circuit Court of Cole County, Missouri, begun and held at the Court House in the City of Jefferson, in the County and State aforesaid, before the Honorable Sam C. Blair, Judge of the 14th Judicial Circuit of the State of Missouri and Judge of this Court, the following, among other proceedings, were had, to-wit:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

SEPTEMBER TERM 1954
TUESDAY NOVEMBER 23rd, 1954

State of Missouri, Plaintiff,	)	
vs.	)	No. 5259
JAMES WILLIAM STIDHAM, DON WILLIAM DE LAPP, et al., Defendants.	)	

Now at this day Grand Jury Indictment charging Murder is received and filed and capias warrants issued by the Clerk.

(Which said Grand Jury Indictment is in writing and appearing in the following words and figures, to-wit:)

"IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI
SEPTEMBER TERM, 1954

Filed
Nov. 23, 1954
Guy M. Stone
Clerk

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

[3] State of Missouri,)
Plaintiff,)
vs.) No. 5259
William R. Hoover, Jackie Lee Noble, Paul)
Edward Kenton, James William Stidham,)
Rollie Laster, Don Wm. DeLapp, and)
Joseph M. Vidauri,)
Defendants.)

INDICTMENT

The Grand Jurors of the State of Missouri, duly summoned from the body of the County of Cole, State of Missouri, and duly impaneled, sworn, and charged to inquire within and for said County, upon their oaths, present and charge that William R. Hoover, Jackie Lee Noble, Paul Edward Kenton, James William Stidham, Rollie Laster, Don Wm. DeLapp, and Joseph M. Vidauri, on or about the 22nd day of September, 1954, at the County of Cole, State of Missouri, did then and there feloniously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought, make an assault upon one Walter Lee Donnell and then and there with dangerous and deadly weapons, to-wit: a sledge hammer, and a knife, and another sharp instrument or dagger, the exact nature of which is unknown to these Grand Jurors, a wooden table leg, and other blunt instruments, the exact nature of which is unknown to these Grand Jurors, and their fists and hands and feet, the said William R. Hoover, [4] Jackie Lee Noble, Paul Edward Kenton, James William Stidham, Rollie Laster, Don Wm. DeLapp, and Joseph M. Vidauri, did feloniously, wilfully, deliberately, premediatedly, on purpose, and of their malice aforethought, forcibly strike, hit, stab,

cut, beat, and stomp the said Walter Lee Donnell, thus and thereby by the means aforesaid and in the manner aforesaid feloniously, wilfully, deliberately, premeditatedly, on purpose, and of their malice aforethought, giving then and there to the said Walter Lee Donnell about his face, head and body, mortal wounds of which mortal wounds the said Walter Lee Donnell on or about the 22nd day of September, 1954, at the County of Cole, State of Missouri, did die.

And so the Grand Jurors, as aforesaid, upon their oaths, as aforesaid, do say that the said William R. Hoover, Jackie Lee Noble, Paul Edward Kenton, James William Stidham, Rollie Laster, Don Wm. DeLapp, and Joseph M. Vidauri, by the means aforesaid and in the manner and form aforesaid, at Cole County, State of Missouri, did feloniously, wilfully, deliberately, premediatedly, on purpose, of their malice aforethought, did kill and murder the said Walter Lee Donnell, against the peace and dignity of the State.

A True Bill
(Signed) Victor Witthaus
Foreman of the Grand Jury

(Signed) James T. Riley
Prosecuting Attorney
Cole County, Missouri

[5] Witnesses for State:

G. Donald Shull
W. S. Barton
John Bauer
Walter Eitzman
P. R. Little
Charles Billings
R. C. Caldwell
Jesse Renderer
Edw. H. Schaaf
Joe Lamar
Thomas Pasley
J. J. Rouse
R. N. Eidson
Hugh Waggoner
J. C. Smith
Clarence Dietzel
Jefferson T. Gentry
Ben H. Cederburg
P. E. Corl
Otto S. Atkinson

Otto McDermott
E. Brown
H. M. Fennimore
John F. Williams
James O. Rhoads
Walter Eitzman
Elmer Oberbech
Thomas Jenneman
E. V. Nash
P. M. Inman
Earl E. Barkley
Ralph King
Leon Wade
Oscar Carrington
Thomas Crane
William Steinhauser
Bernard Poiry
J. G. Hanchey
Sylvester Dulle
James Eynard
Herman Trout
Richard V. Gonzales
James Marvin Creighton
Charles Henry Ford
William Henry Kauffman
Harry (Woody) Miles
Martin Jenson"

[6] (Which said Capias Warrant as to Defendant Don Wm. DeLapp is in writing and appearing in the following words and figures, to-wit:)

CAPIAS

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

THE STATE OF MISSOURI, TO THE SHERIFF OF COLE COUNTY,—GREETING:

YOU ARE HEREBY COMMANDED to take the body of James Wm. Stidham if he be found in your county, and him safely keep so that you have his body before the Circuit Court of Cole County on the First Monday in December next, then and there to answer unto the State of Missouri on an indictment for Murder whereof he stands charged, and have you then and there this Writ, and do you certify to our said Court how you execute this writ.

IN TESTIMONY WHEREOF, I, Guy M. Sone, Clerk of said County, have hereunto set my hand and seal of said

Court, at office in the City of Jefferson, this 23rd day of November, A. D. 1954.

(Seal) (Signed) Guy M. Sone, Clerk

SHERIFF'S RETURN

I certify that on the 23rd day of November, 1954, I read the within Capias to the within named Don William DeLapp within his hearing and presence.

[7] Witness my hand this 23rd day of November, 1954, in the County of Cole, State of Missouri.

Ben S. Markway, Sheriff
(Signed) S. H. Smith, Deputy

Fee $1.00

AND THEREAFTER, to-wit, on the same day, to-wit, November 23rd, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

SEPTEMBER TERM 1954

TUESDAY NOVEMBER 23rd 1954

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham, Don Wm. DeLapp, et al.,	)	
Defendants.	)	

Now at this day comes James T. Riley, Prosecuting Attorney within and for Cole County, Missouri, and come the Defendants, William R. Hoover, Jackie Lee Noble, Paul Edward Kenton, James William Stidham, Rollie Laster, Don William DeLapp, and Joseph M. Vidauri, in open Court and all defendants duly arraigned.

It is ordered by the Court that the Clerk of this Court be ordered to furnish each defendant with a certified copy of the indictment herein within twenty-four hours.

[8] The Court finds alleged offenses and defendants are not bailable and the Court orders each defendant committed to the custody of the Warden of the State Penitentiary.

And now, come Defendants James William Stidham, Joseph M. Vidauri, Jackie Lee Noble and Rollie Laster and request the Court to appoint Mark Hennelly, St. Louis, Missouri, their counsel, and he is so appointed.

It is further ordered by the Court that John H. Hendren be appointed to represent Defendant William R. Hoover.

It is further ordered by the Court that Mark Hennelly be appointed to represent Don William DeLapp.

It is ordered by the Court that defendant Paul Edward Kenton be granted time to obtain counsel.

It is further ordered by the Court that S. W. James, Jr. be appointed counsel for Jackie Lee Noble.

It is further ordered by the Court that Russell T. Keyes be appointed counsel for Don William DeLapp.

It is further ordered by the Court that Tweedie Fisher be appointed counsel for Joseph M. Vidauri.

It is further ordered by the Court that H. P. Andre be appointed counsel for William R. Hoover.

AND THEREAFTER, to-wit, on December 6, 1954, the following further proceedings were had herein:

[9] IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

DECEMBER TERM 1954

MONDAY DECEMBER 6th, 1954

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham, Don Wm. DeLapp, et al.,	)	
Defendants.	)	

On this 6th day of December, 1954, the Court, exercising the authority vested by Rule 25.06, Rules of Criminal Procedure, adopted by the Supreme Court April 14, 1952, and effective January 1, 1953, determines and orders that all motions raising defenses and objections, or for production of documents or evidence or discovery, except where issues of fact are involved which are required by the Constitution or by the Laws of this State to be tried by jury; shall be filed in this cause on or before December 15, 1954, and shall be presented to the Court on Law Day, December 20, 1954, or as soon thereafter as the Court can hear defendants and their counsel.

AND THEREAFTER, to-wit, on the same day, December 6th, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI
DECEMBER TERM 1954
MONDAY DECEMBER 6th, 1954

[10] State of Missouri,)
Plaintiff,)
vs.) No. 5259
James William Stidham, Don Wm. DeLapp, et al.,)
Defendants.)

Now at this day, at his request, the Court permits Mark Hennelly to withdraw as counsel for all defendants except James William Stidham, owing to what be believes to be an apparent conflict between the interests of the several defendants.

AND THEREAFTER, to-wit, on the same day, December 6th, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI
DECEMBER TERM 1954
MONDAY DECEMBER 6th, 1954

State of Missouri,)
Plaintiff,)
vs.) No. 5259
James William Stidham, Don Wm. DeLapp, et al.,)
Defendants.)

Now at this day comes James T. Riley, Prosecuting Attorney within and for Cole County, Missouri; and come Defendants William R. Hoover, Jackie Lee Noble, James

William Stidham, Rollie Laster, Don William DeLapp and Joseph M. Vidauri, [11] in their own proper person and by their attorneys and enter herein a plea of not guilty to the charge contained in the indictment, with leave to withdraw the same.

AND THEREAFTER, to-wit, on the same day, December 6th, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

DECEMBER TERM 1954

MONDAY DECEMBER 6th, 1954

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham, Don Wm. DeLapp, et al.,	)	
Defendants.	)	

Now at this day it is ordered by the Court that all permissions for withdrawal of pleas of not guilty is for the purpose of permitting defendants to file motions in compliance with the Court's order of this date.

AND THEREAFTER, to-wit, on December 14th, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

DECEMBER TERM 1954

TUESDAY DECEMBER 14, 1954

State of Missouri,)
Plaintiff,)
vs.) No. 5259
James William Stidham,)
Defendant.)

[12] Now at this day comes defendant, James William Stidham, by his attorney, and files his Motions for Production and Inspection, To Dismiss, for a Severance, for a Polygraph Examination and to Suppress.

(Which said Motion for Production and Inspection is in writing and appearing in the following words and figures, to-wit:)

"In the
Circuit Court of Cole County, Missouri

December Term, 1954

Filed
Dec. 14, 1954
Guy M. Sone
Clerk.

State of Missouri,)
Plaintiff,)
vs.) No. 5259
William R. Hoover, et al.,)
Defendants.)

MOTION OF DEFENDANT, JAMES WILLIAM STIDHAM FOR PRODUCTION AND INSPECTION

1. Defendant James William Stidham moves the Court for an order requiring the Prosecuting Attorney to produce

and to permit the defendant to inspect and copy at a time and place set by the Court before trial of this cause all statements claimed by the State to have been made by the defendant which the State intends to offer into evidence at the trial of defendant.

[13] 2. That the inspection and copying of the statements are necessary to enable this defendant to prepare his case for trial and that defendant cannot safely proceed to trial unless and until he has such information.

(Signed)
Mark M. Hennelly
Attorney for Defendant
James William Stidham,
1832 Arcade Building
St. Louis 1, Missouri
Chestnut 1-2242."

(Which said Motion to Dismiss is in writing and appearing the following words and figures, to-wit:)

"IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI
DECEMBER TERM, 1954

Filed
Dec. 14, 1954
Guy M. Sone
Clerk

State of Missouri,)
Plaintiff,)
vs.) No. 5259
WILLIAM R. HOOVER, et al.,)
Defendants.)

MOTION OF DEFENDANT, JAMES WILLIAM STIDHAM, TO DISMISS

Defendant moves the Court to dismiss the Indictment for the following reason:

The indictment is duplicitous for the reason that it [14] purports to charge two crimes. It purportedly charges both a homicide and an assault with intent to kill.

(Signed)
Mark M. Hennelly
Attorney for Defendant
James William Stidham
1832 Arcade Building
St. Louis 1, Missouri
Chestnut 1-2242."

(Which said Motion for a Severance is in writing and appearing in the following words and figures, to-wit:)

"IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

DECEMBER TERM, 1954

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
William R. Hoover, et al.,	)	
Defendants.	)	

MOTION OF DEFENDANT, JAMES WILLIAM STIDHAM FOR A SEVERANCE

Defendant, James William Stidham, moves the Court to grant him a severance from his co-defendants.

1. He has an absolute right to a severance.

2. Evidence in this case will be introduced by the State which will be prejudicial against him and which would be inadmissible against him at a separate trial.

3. The defendant, as well as his co-defendants, will [15] obtain a fairer and more impartial trial if he is tried alone.

(Signed)
Mark M. Hennelly
Attorney for Defendant
James William Stidham
1832 Arcade Building
St. Louis 1, Missouri
Chestnut 1-2242."

(Which said Motion for a Polygraph Examination is in writing and appearing in the following words and figures, to-wit:)

"IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

DECEMBER TERM, 1954

Filed
Dec. 14, 1954
Guy M. Sone
Clerk.

State of Missouri,)
Plaintiff,)
vs.) No. 5259
William R. Hoover, et al.,)
Defendants.)

MOTION OF DEFENDANT, JAMES WILLIAM STIDHAM FOR A POLYGRAPH EXAMINATION

Defendant, James William Stidham, moves the Court to appoint an independent polygraph examiner or any other examiner qualified to administer any other type of "lie detector" examination described by the Court, for the pur-

pose of interrogating him relative to the charges set forth in the indictment in this [16] cause at such time and in the presence of such people as the Court shall designate and as grounds for this motion states:

1. Such an examination will assist this defendant in establishing his innocence of the charge set forth in the Indictment.

2. Defendant intends to introduce into evidence the testimony of such examiner and the result of such examination.

This defendant further states to the Court that he is willing to pay the costs of such examination.

(Signed)
Mark M. Hennelly;
Attorney for Defendant
James William Stidham
1832 Arcade Building
St. Louis 1, Missouri
Chestnut 1-2242."

(Which said Motion to Suppress is in writing and appearing in the following words and figures, to-wit:)

"IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI
DECEMBER TERM, 1954

Filed
Dec. 14, 1954
Guy M. Sone
Clerk.

State of Missouri,)
Plaintiff,)
vs.) No. 5259
William R. Hoover, et al.,)
Defendants.)

[17] MOTION OF DEFENDANT, JAMES WILLIAM STIDHAM TO SUPPRESS

Defendant, James William Stidham, moves the Court to Suppress as evidence any and all statements claimed to have been made by this defendant to peace officers of the State of Missouri, to guards and officers of the Missouri State Penitentiary and to other officials of the State of Missouri and as grounds for this motion states:

1. All of the aforementioned alleged statements were involuntary and as a result of physical force and threats of physcial force applied against this defendant by police officers of the City of St. Louis, guards of the Missouri State Penitentiary and officers of the Missouri Highway Patrol.

2. The use of any of the aforementioned statements against this defendant would contravene his right to due processes of law as guaranteed by the due process clause of Article I section 10 of the Missouri Constitution and Amendment 14 of the United States Constitution, and would

contravene his privileges against self-incrimination and as guaranteed by Article I Section 19 of the Missouri Constitution.

3. This defendant was further denied the assistance of counsel by not being permitted counsel at the time of the alleged statements in violation of Article I Section 18 (a) of the Missouri Constitution.

[18]

(Signed)
Mark M. Hennelly
Attorney for Defendant
James William Stidham
1832 Arcade Building
St. Louis 1, Missouri
Chestnut 1-2242."

AND THEREAFTER, to-wit, on December 20th, 1954, the following further proceedings were had herein:

DECEMBER TERM 1954

MONDAY DECEMBER 20, 1954

State of Missouri,	)	
	Plaintiff,)	
vs.	)	No. 5259
James William Stidham,	)	
	Defendant.)	

Now at this day Motion of Defendant James William Stidham, for a severance is by the Court taken up and granted.

AND THEREAFTER, to-wit, on the same day, December 20th, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI
DECEMBER TERM 1954
MONDAY DECEMBER 20, 1954

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham,	)	
Defendant.	)	

Now at this day Motion of Defendant James William Stidham [19] to Dismiss is by the Court taken up and after hearing argument of counsel, doth overrule said Motion to Dismiss.

AND THEREAFTER, to-wit, on the same day, December 20th, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI
DECEMBER TERM 1954
MONDAY DECEMBER 20, 1954

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham,	)	
Defendant.	)	

Now at this day Motion for Polygraph Examination by Defendant James William Stidham is by the Court taken up and after hearing argument of counsel, doth take said motion under advisement.

AND THEREAFTER, to-wit, on the same date, December 20th, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

DECEMBER TERM 1954

MONDAY DECEMBER 20th, 1954

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham,	)	
Defendant.	)	

[20] Now at this day Motion to Suppress by defendant James William Stidham is by the Court taken up and after hearing argument of counsel, doth overrule said Motion to Suppress.

AND THEREAFTER, to-wit, on the same day, the 20th day of December, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

DECEMBER TERM 1954

MONDAY DECEMBER 20, 1954

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham,	)	
Defendant.	)	

Now at this day Motion for Production of Statement on behalf of Defendant James William Stidham is by the Court taken up and after hearing argument of counsel, doth take said Motion under advisement.

AND THEREAFTER, to-wit, on the same day, December 20th, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

DECEMBER TERM 1954

MONDAY DECEMBER 20, 1954

State of Missouri,	)	
Plaintiff,	)	
[21] vs.	)	No. 5259
James William Stidham,	)	
Defendant.	)	

Now at this day it is ordered by the Court that Defendant James William Stidham be granted until December 24th, 1954, to file brief herein.

AND THEREAFTER, to-wit, on Monday, December 20th, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

DECEMBER TERM 1954

MONDAY DECEMBER 20, 1954

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham,	)	
Defendant.	)	

Now at this day it is ordered by the Court that the State of Missouri be granted leave to endorse the names of additional witnesses upon the Indictment.

AND THEREAFTER, to-wit, on the same day, December 20th, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI
DECEMBER TERM 1954
MONDAY DECEMBER 20, 1954

[22] State of Missouri, Plaintiff,
vs.
James William Stidham, Defendant. No. 5259

Now at this day it is ordered by the Court that the case of James William Stidham be set for trial on January 26th, 1955.

AND THEREAFTER, to-wit, on December 23rd, 1954, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI
DECEMBER TERM 1954
THURSDAY DECEMBER 23, 1954

State of Missouri, Plaintiff,
vs.
James William Stidham, Defendant. No. 5259

Now at this day it is ordered by the Court that all applications for Polygraph Tests are overruled as to each Defendant who has filed same.

AND THEREAFTER, to-wit, on January 3rd, 1955, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

[23] DECEMBER TERM 1954

MONDAY JANUARY 3, 1955

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham, et al.,	)	
Defendants.	)	

Now at this day it is ordered by the Court that rulings on Motions to Produce as per opinion filed this date. (See opinion)

AND THEREAFTER, on January 13th, 1955, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

DECEMBER TERM 1954

THURSDAY JANUARY 13, 1955

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham, et al.,	)	
Defendants.	)	

Now at this day comes James T. Riley, Prosecuting Attorney, and confesses motions for production, heretofore argued on January 12th, 1955, and volunteers to produce same within twenty-four hours.

And now, the Court reconsiders the Motion of Defendant James William Stidham, and sets aside ruling heretofore made [24] herein. And now, comes the Prosecuting

Attorney and confesses motion of Defendant James William Stidham for production and volunteers to produce same within twenty-four hours.

AND THEREAFTER, to-wit, on January 24th, 1955, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI
DECEMBER TERM 1954
MONDAY JANUARY 24, 1955

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham,	)	
Defendant.	)	

Now at this day comes the defendant, James William Stidham, by his attorneys, and files his application for continuance, which is presented and by the Court granted.

It is further ordered by the Court that the cause of State of Missouri vs. James William Stidham be set for 9:00 A. M. on February 15th, 1955.

AND THEREAFTER, said Motion of Defendant, James William Stidham for Continuance is in writing and appearing in the following words and figures, to-wit:

"IN THE
CIRCUIT COURT OF COLE COUNTY,
STATE OF MISSOURI

[25]

Filed
1-24-55
Sam C. Blair
Judge

State of Missouri,)
Plaintiff,)
vs.)
William R. Hoover, et al.,)
Defendants.)

MOTION OF DEFENDANT, JAMES WILLIAM STIDHAM FOR CONTINUANCE

Defendant, James William Stidham, moves the Court to grant him a continuance in the above captioned cause and as grounds for this motion states:

1. On the basis of a copy of the written statement given the police by the defendant which was during the preceding week made available to defendant and his counsel certain depositions of endorsed State witnesses appear necessary in order that defendant may prepare a proper defense to the charges against him.

2. Due to the fact that one of defendant's co-defendants is on trial at this time the attendant publicity and notoriety surrounding this matter will serve to re-arouse the citizens of this community and will create bias and

prejudice to such an extent that it will be impossible for the defendant to have a fair trial.

[26] (Signed)
Mark M. Hennelly
William B. Kelleher
Attorneys for Defendant
1832 Arcade Bldg.,
St. Louis, Mo."

AND THEREAFTER, to-wit, on February 14th, 1955, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

FEBRUARY TERM 1955

MONDAY FEBRUARY 14, 1955

State of Missouri, Plaintiff,	)	
vs.	)	No. 5259
James William Stidham, Defendant.	)	

Now at this day comes James T. Riley, Prosecuting Attorney, and comes the defendant James William Stidham, by his attorney, William B. Kelleher, and files his application for change of venue and presents same to the Court, and the Court being advised in the matter, does deny said application for change of venue on ground affidavits state no facts and Notice given at 4:45 P.M. on this date is insufficient, this cause being set for trial at 9:00 A.M., February 16th, 1955.

AND THEREAFTER, to-wit, on February 15th, 1955, the [27] following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

FEBRUARY TERM 1955

TUESDAY FEBRUARY 15, 1955

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James Wm. Stidham,	)	
Defendant.	)	

Now at this day comes the Defendant, James William Stidham, by his attorney William B. Kelleher, and files his Application for Change of Venue, at 1:45 P.M. this day, accompanied by affidavits. No notice given the prosecuting Attorney of intention to file this application until 1:30 P.M. this date.

And now, comes the Defendant, by his attorney, and presents his application for Change of Venue to the Court at 1:45 P.M. this date, which is considered and by the Court denied for want of reasonable notice.

(Which said Application and Affidavit for Change of Venue, together with Supporting Affidavits are in writing and appearing in the following words and figures, to-wit:)

"IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

RE-FILED
Feb. 15, 1955
at 4:40 P.M.
Guy M. Sone
Clerk

Filed
2-15-55
Sam C. Blair
Judge

[28] State of Missouri,)
Plaintiff,)
vs.) No. 5259
William R. Hoover, et al,)
Defendants.)

To: The Hon. James T. Riley, Pros. Attorney, in and for the County of Cole, Missouri:

Please take notice that the defendant, James W. Stidham, by his attorney, William Kelleher, will file in the above entitled cause his Application and Affidavit of five disinterested citizens, residing in different neighborhoods of this county this 15th day of February, 1955.

AND PLEASE TAKE FURTHER NOTICE:

That on the 15th day of February, 1955, at 1 o'clock in the afternoon or as soon thereafter as counsel may be heard, the undersigned attorney for the defendant, will call up for hearing before the Hon. Sam C. Blair, the above Application and Affidavit of defendant, James W. Stidham.

(Signed)
William B. Kelleher
Arcade Bldg.,
St. Louis, Mo.

Received a copy of the foregoing Notice this February 15th, 1955, at 6:40 P.M.

(Signed) James T. Riley

[29] IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

Re-filed
2-15-55
@ 4:40 P.M.
Guy M. Sone
Clerk

Filed
2-15
Sam C. Blair
Judge

State of Missouri,)
Plaintiff,)
vs.) No. 5259
William R. Hoover, et al.,)
Defendants.)

APPLICATION AND AFFIDAVIT FOR CHANGE OF VENUE

Now comes James W. Stidham, defendant in the above entitled cause and states that by indictment of November 23, 1954, charging this defendant with first degree murder of one Walter Lee Donnell, this defendant will be tried and held to answer said Indictment as provided by Law; and by this application and affidavit for change of venue states that this affiant has good reason and does believe that he cannot have a fair and impartial trial in said cause in Cole County, Missouri for the reasons that newspapers, television, radio, magazines and other manner and means of disseminating stories about this defendant have caused the minds of citizens of Cole County to be biased and prejudiced against this defendant; that the outcome and publicity arising out of the trial of State of Missouri vs. Donald DeLapp, concluded January 28th, 1955, has caused bias and prejudice in the minds of the citizens [30] of Cole County against this defendant; that the above facts have become known to this defendant, first, within the past three days preceding the filing of

this application and affidavit and during all of the above time this defendant has been confined and in custody at the Missouri State Penitentiary.

(Signed)
James W. Stidham

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

James W. Stidham, being first duly sworn, on his oath, states that he has signed the above Application and Affidavit for Change of Venue and that the facts stated therein are true to his best knowledge and belief and believes that he cannot have a fair and impartial trial because the minds of the inhabitants and citizens of Cole County, Missouri, are prejudiced and biased against him.

(Signed)
James W. Stidham

Witness my hand and seal February 15th, 1955.

(Signed)
W. C. Sanders
Notary Public.

(Seal)

My Com. Exps. February 15, 1958.

[31] "IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

Re-filed
Feb. 15, '55
@ 4:40 P.M.
Guy M. Sone
Clerk

Filed
2-15-55
Sam C. Blair
Judge

STATE OF MISSOURI,)
Plaintiff,)
vs.) No. 5259
WILLIAM R. HOOVER, et al.)
Defendants.)

AFFIDAVIT IN SUPPORT OF APPLICATION OF DEFENDANT JAMES WM. STIDHAM FOR A CHANGE OF VENUE

Comes now Mrs. H. J. Schulte, a credible disinterested citizen residing in the Marion Township neighborhood of Cole County, Missouri, being duly sworn, deposes and says that she has discussed with citizens of the neighborhood in which she resides and has heard discussed by citizens in the neighborhood in which she resides the charge or charges made against defendant James William Stidham in the above captioned case and also other charges made by the State of Missouri against other inmates of the Missouri State Penitentiary at Jefferson City, Missouri, arising out of incidents and events which occurred at said Penitentiary on September 22 and 23, 1954, and that the comments, opinions and conclusions of citizens residing in the Marion Township neighborhood are unfavorable concerning the said James William Stidham and other inmates of the Missouri [32] State Penitentiary against whom criminal charges have been made for and arising out of events and incidents which occurred at said

penitentiary on the dates aforesaid; that, generally, the citizens of said neighborhood express the opinion or conclusion that defendant James William Stidham and other inmates of said penitentiary charged by the State of Missouri with crimes arising out of said events and incidents are guilty of the crimes charged and should be severely punished for said crimes; and that, generally, there prevails among the citizens of said neighborhood hostility and bias against defendant James William Stidham and other inmates of said penitentiary charged with crimes arising out of said incidents and events, with reference to their guilt or innocence of said charges.

WHEREFORE, your affiant says that he verily believes that the minds of the citizens of Cole County, Missouri, are so prejudiced against the defendant that the defendant cannot have a fair trial in said County of the charges brought against him in the above captioned case. Your affiant says further that she is not related by blood or marriage to or of counsel for the defendant James William Stidham.

Dated this 15th day of February, 1955.

/s/ Mrs. H. J. Schulte
Route 5
Jefferson City, Mo.

[33] STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to February 15th, 1955, before me, a Notary Public in and for Cole County, Missouri.

My commission expires February 15, 1958.

(Signed)
W. C. Sanders
(Seal) Notary Public."

"IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

Re-filed
Feb. 15, '55
@ 4:40 P.M.
Guy M. Sone
Clerk

Filed
2-15-55
Sam C. Blair
Judge

STATE OF MISSOURI,)
Plaintiff,)
vs.) No. 5259
WILLIAM R. HOOVER, et al.,)
Defendants.)

AFFIDAVIT IN SUPPORT OF APPLICATION OF DEFENDANT James Wm. Stidham FOR A CHANGE OF VENUE

Comes now James H. Brand, a credible disinterested citizen residing in the Liberty Township neighborhood of Cole County, Missouri, being duly sworn, deposes and says that he has discussed with citizens of the neighborhood in which he resides and has heard discussed by citizens in the neighborhood in which he resides the charge or charges made against defendant James William Stidham in the above captioned case and also [34] other charges made by the State of Missouri against other inmates of the Missouri State Penitentiary at Jefferson City, Missouri, arising out of incidents and events which occurred at said penitentiary on September 22 and 23, 1954, and that the comments, opinions and conclusions of citizens residing in the Liberty Township neighborhood are unfavorable concerning the said James William Stidham and other inmates of the Missouri State Penitentiary against whom criminal charges have been made for and arising out of events and incidents which occurred at said

penitentiary on the dates aforesaid; that, generally, the citizens of said neighborhood express the opinion or conclusion that defendant James William Stidham and other inmates of said penitentiary charged by the State of Missouri with crimes arising out of said events and incidents are guilty of the crimes charged and should be severely punished for said crimes; and that, generally, there prevails among the citizens of said neighborhood hostility and bias against defendant James William Stidham and other inmates of said penitentiary charged with crimes arising out of said incidents and events, with reference to their guilt or innocence of said charges.

WHEREFORE, your affiant says that he verily believes that the minds of the citizens of Cole County, Missouri, are so prejudiced against the defendant that the defendant cannot have a fair trial in said County of the charges brought against [35] him in the above captioned case. Your affiant says further that he is not related by blood or marriage to or of counsel for the defendant James William Stidham.

Dated this 15th day of February, 1955.

(Signed)
James H. Brand
RR #3, Jefferson City, Mo.

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to February 15th, 1955, before me, a Notary Public in and for Cole County, Missouri.

My commission expires February 15, 1958.

(Signed)
W. C. Sanders
Notary Public."

(Seal)

"IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

Re-filed
Feb. 15, '55
@ 4:40 P.M.
Guy M. Sone
Clerk

Filed
2-15-55
Sam C. Blair
Judge

STATE OF MISSOURI,)
Plaintiff,)
vs.) No. 5259
WILLIAM R. HOOVER, ET AL)
Defendants.)

AFFIDAVIT IN SUPPORT OF APPLICATION OF DEFENDANT JAMES WM. STIDHAM FOR A CHANGE OF VENUE

[36] Comes now Charles J. Kolb, a credible disinterested citizen residing in the Jefferson Township neighborhood of Cole County, Missouri, being duly sworn, deposes and says that he has discussed with citizens of the neighborhood in which he resides and has heard discussed by citizens in the neighborhood in which he resides the charge or charges made against defendant James William Stidham in the above captioned case and also other charges made by the State of Missouri against other inmates of the Missouri State Penitentiary at Jefferson City, Missouri, arising out of incidents and events which occurred at said penitentiary on September 22 and 23, 1954, and that the comments, opinions and conclusions of citizens residing in the Jefferson Township neighborhood are unfavorable concerning the said James William Stidham and other inmates of the Missouri State Penitentiary against whom criminal charges have been made for and arising out of events and incidents which occurred at said

penitentiary on the dates aforesaid; that, generally, the citizens of said neighborhood express the opinion or conclusion that defendant James William Stidham and other inmates of said penitentiary charged by the State of Missouri with crimes arising out of said events and incidents are guilty of the crimes charged and should be severely punished for said crimes; and that, generally, there prevails among the citizens of said neighborhood hostility and bias against defendant James William Stidham and other inmates of said penitentiary [37] charged with crimes arising out of said incidents and events, with reference to their guilt or innocence of said charges.

WHEREFORE, your affiant says that he verily believes that the minds of the citizens of Cole County, Missouri, are so prejudiced against the defendant that the defendant cannot have a fair trial in said County of the charges brought against him in the above captioned case. Your affiant says further that he is not related by blood or marriage to or of counsel for the defendant James William Stidham.

Dated this 15th day of February, 1955.

(Signed)
Charles J. Kolb
Rt. #4
Jefferson City, Mo.

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to February 15th, 1955, before me, a Notary Public in and for Cole County, Missouri.

My commission expires February 15, 1958.

(Signed)
W. C. Sanders
(Seal) Notary Public."

"IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

Re-filed
Feb. 15, '55
@ 4:40 P.M.
Guy M. Sone
Clerk

Filed
2-15-55
Sam C. Blair
Judge

[38] STATE OF MISSOURI,)
Plaintiff,)
vs.) No. 5259
WILLIAM R. HOOVER, ET AL)
Defendants.)

AFFIDAVIT IN SUPPORT OF APPLICATION OF DEFENDANT JAMES WM. STIDHAM FOR A CHANGE OF VENUE

Comes now Norbert Schellman, a credible disinterested citizen residing in the Jefferson Township neighborhood of Cole County, Missouri, being duly sworn, deposes and says that he has discussed with citizens of the neighborhood in which he resides and has heard discussed by citizens in the neighborhood in which he resides the charge or charges made against defendant James William Stidham in the above captioned case and also other charges made by the State of Missouri against other inmates of the Missouri State Penitentiary at Jefferson City, Missouri, arising out of incidents and events which occurred at said penitentiary on September 22 and 23, 1954, and that the comments, opinions and conclusions of citizens residing in the Jefferson Township neighborhood are unfavorable concerning the said James William Stidham and other inmates of the Missouri State Penitentiary against whom criminal charges have been made for and arising out of events and incidents which occurred at said

penitentiary on the dates aforesaid; that, generally, the citizens of said neighborhood express the opinion or [39] conclusion that defendant James William Stidham and other inmates of said penitentiary charged by the State of Missouri with crimes arising out of said events and incidents are guilty of the crimes charged and should be severely punished for said crimes; and that, generally, there prevails among the citizens of said neighborhood hostility and bias against defendant James William Stidham and other inmates of said penitentiary charged with crimes arising out of said incidents and events, with reference to their guilt or innocence of said charges.

WHEREFORE, your affiant says that he verily believes that the minds of the citizens of Cole County, Missouri, are so prejudiced against the defendant that the defendant cannot have a fair trial in said County of the charges brought against him in the above captioned case. Your affiant says further that he is not related by blood or marriage to or of counsel for the defendant James William Stidham.

Dated this 15th day of February, 1955.

(Signed)
Norbert J. Schellman
523½ Madison Street
Jefferson City, Mo.

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to February 15th, 1955, before me, a Notary Public in and for Cole County, Missouri.

[40] My commission expires February 15, 1958.

(Signed)
W. C. Sanders
Notary Public."

(Seal)

"IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

Re-filed
Feb. 15, '55
@ 4:40 P.M.
Guy M. Sone
Clerk

Filed
2-15-55
Sam C. Blair
Judge

STATE OF MISSOURI,)
Plaintiff,)
vs.) No. 5259
WILLIAM R. HOOVER, ET AL,)
Defendants.)

AFFIDAVIT IN SUPPORT OF APPLICATION OF DEFENDANT JAMES WM. STIDHAM FOR A CHANGE OF VENUE

Comes now C. J. Cremer, a credible disinterested citizen residing in the Moreau Township neighborhood of Cole County, Missouri, being duly sworn, deposes and says that he has discussed with citizens of the neighborhood in which he resides and has heard discussed by citizens in the neighborhood in which he resides the charge or charges made against defendant James William Stidham in the above captioned case and also other charges made by the State of Missouri against other inmates of the Missouri State Penitentiary at Jefferson City, Missouri, arising out of incidents and events which occurred at said [41] penitentiary on September 22 and 23, 1954, and that the comments, opinions and conclusions of citizens residing in the Moreau Township neighborhood are unfavorable concerning the said James William Stidham and other inmates of the Missouri State Penitentiary against whom criminal charges have been made for and arising out of events and incidents which occurred at said

penitentiary on the dates aforesaid; that, generally, the citizens of said neighborhood express the opinion or conclusion that defendant James William Stidham and other inmates of said penitentiary charged by the State of Missouri with crimes arising out of said events and incidents are guilty of the crimes charged and should be severely punished for said crimes; and that, generally, there prevails among the citizens of said neighborhood hostility and bias against defendant James William Stidham and other inmates of said penitentiary charged with crimes arising out of said incidents and events, with reference to their guilt or innocence of said charges.

WHEREFORE, your affiant says that he verily believes that the minds of the citizens of Cole County, Missouri, are so prejudiced against the defendant that the defendant cannot have a fair trial in said County of the charges brought against him in the above captioned case. Your affiant says further that he is not related by blood or marriage to or of counsel for the defendant James William Stidham.

[42] Dated this 15th day of February, 1955.

(Signed)
C. J. Cremer
Russellville, Mo.

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to February 15th, 1955, before me, a notary public in and for Cole County, Missouri.

My commission expires February 15, 1958.

(Signed)
W. C. Sanders
(Seal) Notary Public."

AND THEREAFTER, to-wit, on the same day, February 15, 1955, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

FEBRUARY TERM 1955

TUESDAY FEBRUARY 15, 1955

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham,	)	
Defendant.	)	

Now at this day comes the Defendant, James William Stidham, by his attorney, and files his Affidavit for Disqualification of Judge, at 4:45 P.M. this date.

[43] (Which said Affidavit for Disqualification of Judge is in writing and appearing in the following words and figures, to-wit:)

"IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

Filed
Feb. 15, 1955
@ 4:45 P.M.
Guy M. Sone
Clerk.

State of Missouri,)
Plaintiff,)
vs.) No. 5259
William R. Hoover, et al.,)
Defendants.)

AFFIDAVIT FOR DISQUALIFICATION OF JUDGE BY JAMES W. STIDHAM

Comes now James W. Stidham, and who after being first duly sworn, upon his oath, deposes and says that the Hon. Sam C. Blair, Circuit Judge of the County of Cole, Missouri, cannot conduct a fair and impartial trial in this cause by reason of his interest or prejudice, as this affiant verily believes.

Dated this 15th day of February, 1955.

(Signed)
James W. Stidham,
Defendant

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to before me by the said James W. Stidham, this 15th day of February, 1955.

[44] (Signed)
Marion J. Stewart
(Seal) Notary Public,
Cole County, Mo.

My commission expires Feb. 1, 1956."

AND THEREAFTER, to-wit, on the same day, February 15, 1955, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

FEBRUARY TERM 1955

TUESDAY FEBRUARY 15, 1955

State of Missouri,)
Plaintiff,)
vs.) No. 5259
James William Stidham,)
Defendant.)

Now at this day comes the defendant, James William Stidham, by his attorney, and refiles his Notice, Application for Change of Venue, together with supporting affidavits.

(Which said Notice, Application for Change of Venue and Supporting affidavits are set forth within this Transcript and are not re-copied)

AND THEREAFTER, to-wit, on February 16th, 1955, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

[45] FEBRUARY TERM 1955

WEDNESDAY FEBRUARY 16, 1955

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham,	)	
Defendant.	)	

Now at this day comes the Defendant, James William Stidham, by his attorney, and presents his application to disqualify the regular Judge of this Court and same is granted.

And now, the Judge of this Court notifies the Supreme Court and the Chief Justice thereof that the administration of Justice requires transfer of a Circuit Judge to this Court to try this cause, and said cause is set for trial at 9:00 A.M., March 1st, 1955.

AND THEREAFTER, TO-WIT, ON February 22nd, 1955, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

FEBRUARY TERM 1955

TUESDAY FEBRUARY 22nd, 1955

State of Missouri,)
Plaintiff,)
vs.) No. 5259
James William Stidham,)
Defendant.)

Now at this day Order of the Supreme Court of Missouri [46] transferring Hon. George P. Adams, Regular Judge of the 11th Judicial Circuit, to this Court to hear case of State of Missouri vs. James William Stidham, is received and filed.

(Which said order is in writing and appearing in the following words and figures, to-wit:)

"IN THE
SUPREME COURT OF MISSOURI

EN BANC

Friday, February 18, 1955

Filed
Feb. 22, 1955
Guy M. Sone,
Clerk.

In the Matter of the Temporary)
)
Transfer of Judicial Personnel)

WHEREAS, the Honorable Sam C. Blair, Judge of the 14th Judicial Circuit of Missouri, has been disqualified to sit and hear the case of State vs. James William Stidham,

No. 5259, now pending in the Circuit Court of Cole County, Missouri, and has requested the Temporary transfer of a Circuit Judge to said Court to hear said cause;

It is therefore ordered, under Article V, Section 6, Constitution of Missouri, 1945, and Rule 11 of this Court, that Honorable George P. Adams, Judge of the 11th Judicial Circuit of Missouri, be and he is hereby temporarily transferred to said 14th Judicial Circuit, to hear the case of State vs. James William Stidham, No. 5259, now pending in the Circuit Court of Cole County, Missouri; and that such transfer shall [47] remain in effect for the making of any and all orders or the taking of other proceedings that may be required of the trial judge in said cause heard by him.

STATE OF MISSOURI—SCT:

I, Marion Spicer, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order transferring judicial personnel on the 18th day of February, 1955, as fully as the same appears on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 21st day of February, 1955.

(Signed)
Marion Spicer,
Clerk."

AND THEREAFTER, to-wit, on February 25th, 1955, the following further proceedings were had herein:

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

FEBRUARY TERM 1955

FRIDAY FEBRUARY 25, 1955

State of Missouri,)
Plaintiff,)
vs.) No. 5259
James William Stidham,)
Defendant.)

[48] Now at this day Hon. George P. Adams, Judge of the Eleventh Judicial Circuit of Missouri, and transferred to this Court for trial of this cause, assumes the Bench.

And now, comes the Defendant, James William Stidham, by his attorney, William Kelleher, and presents his Notice, Application and Affidavit for Change of Venue, together with Affidavits in Support of Application for Change of Venue.

It is ordered by the Court that change of venue be granted to the Defendant, James William Stidham, to the Circuit Court of Butler County, Missouri, returnable there on the first Monday in April, 1955, the same being the first day of the April Term, 1955, of the Circuit Court of that County. This order is made on the application of the Defendant, James William Stidham, and on the ground he asserts that the minds of the inhabitants of this County are so prejudiced against him that he cannot have a fair trial in this County and this order is made during the Regular February Term, 1955, of this Court.

The Court finds that the Defendant, James William Stidham, is in confinement and the Sheriff of this County hereby is Commanded to transfer the Defendant, James

William, to the Butler County, Missouri, Jail, and there deliver him to the keeper of such jail, together with the warrant or process by virtue of which the defendant is held under this charge.

[49] It is further ordered by the Court that the Clerk shall make out at once a complete transcript of all of the records and proceedings in this cause, including this order of removal, and the application for it, and he shall certify and transmit the same to the Clerk of the Circuit Court of Butler County, Missouri, and take his receipt therefor.

IN THE
CIRCUIT COURT OF COLE COUNTY, MISSOURI

DECEMBER TERM 1954

TUESDAY JANUARY 18th, 1955

State of Missouri,	)	
Plaintiff,	)	
vs.	)	No. 5259
James William Stidham, et al.,	)	
Defendants.	)	

On this 18th day of January, 1955, it is ordered that a Special Venire issue directing the Sheriff to summon Thirty (30) additional jurors for service on the present panel and to supplement the same during the trial to take place in the above styled cause.

(Signed)
Sam C. Blair,
Judge of the Circuit Court of
Cole County, Missouri.

And thereafter to-wit: On the 5th day of March, 1955, the following order was entered of record:

[50] Miscellaneous Record, Circuit Court, Butler County, Missouri Saturday, March 5th, 1955, In Recess, (Book 10, page 382)

Now on this 5th day of March, 1955, this cause of action is filed in this Court on a Change of Venue from the Circuit Court of Cole County, Missouri.

And thereafter to-wit: On the 4th day of April, 1955, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 268) Monday April 4th, 1955, Regular April 1955 Term

Now on this day, this cause being brought to the attention of the Court, the Court finds the defendant having previously entered a plea of Not Guilty and now demanding trial therein and counsel for the State and for the defendant having previously indicated their preference for a setting herein, this cause is by mutual consent set for April 25th, 1955, for trial.

It is ordered by the Court that a Special Venire of 25 jurors be ordered herein to provide for the panel required by law.

And thereafter to-wit: On the 19th day of April, 1955, the following order was entered of record:

[51] Circuit Court Record, Butler County, Missouri (Book 62, page 310) Tuesday, April 19th, 1955, Regular April 1955 Term

Now on this day, comes the defendant herein, by counsel Mark Murray Hennelly, and leave of Court first had and obtained, moves the Court for Subpoena for

Records of Defendant, Register No. H4H relative to phyical examination of defendant, dated September 29 and 30, 1954, directed to the U. S. Medical Center for Federal Prisoners, Springfield, Missouri. And the Court after due consideration, and being now fully advised, does make the order that said Motion be and the same is hereby sustained, and Subpoena Duces Tecum is ordered thereon.

Now comes the defendant herein, by counsel Mark Murray Hennelly, leave of Court first had and obtained, and files Separate Applications for Writs of Habeas Corpus Ad Testificandum for the following prisoners alleged to be incarcerated in the Missouri State Penitentiary: Cecil Lillybridge; William Douglas; Hugh Van Buskirk; Robert Smedley; Elvin Carroll; Jim Harris; James Black; Virgil Hacker; Bob Wilkerson; Baldy Holloway; Ben Griffin; Woody Burnett; Warren Kammer; Louis Miller; Samuel Norbert Reese; Leon Wade; Donald Lyons; Jolin Reid; Marion Crabtree; Silas Varner and J. D. Brooks. Said Application being in due form, it is ordered by the court that they be sustained and Writ of Habeas Corpus Ad Testificandum ordered to issue to the Warden of Missouri State Penitentiary [52] for each of the above named parties, for their Production and appearance herein in this cause, as witnesses, and the Sheriff of Butler County, Missouri, is ordered to serve said Writs.

And thereafter to-wit: On the 25th day of April, 1955, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 317) Monday, April 25th, 1955, Regular April 1955 Term

---

Now at this time, the Court excuses, for cause, the following jurors from the panel: Ernie C. Dunn, George Gregory, William Stephens, and J. D. Snider and L. T. Metz, Jr., before the jury is empaneled and sworn and for reasons stated into the record.

Now on this day, comes the parties herein, Prosecuting Attorney for the State, James T. Riley, and the defendant herein, in person, in the custody of the Sheriff of this County, and in the presence of his counsel, Mark Murray Hennelly, whereupon both defendant and his said counsel being present in open Court, defendant waives formal arraignment, and enters a plea of Not Guilty to the charge of Murder. And this cause coming on to be heard, the same being the day on which this cause has been set for trial, the said parties herein, announce ready for trial and thereupon issues being joined comes now a jury summoned herein, to-wit: Hobert Fowler; Marshall Johnson; [53] W. L. Allison; Floyd Walker; Lydle Beardon; James Hawkins; Paul Baumgardner; A. C. King, Jr.; Charles Ijames; L. C. Fuller; Robert Snider and George Williams, (12) good and lawful men of and from the body of Butler County who are duly selected, impaneled, and sworn to well and truly try the issues now joined herein and a true verdict render to the Court in accordance with the law and the evidence in the case.

Jurors, Irene Eudaley, Allen Garner, Sr., Henry Blackman, Mrs. G. R. Saracini, C. C. Cope, Ed Forrest, Roy Bagents, Glen Terry are excused upon Qualifications on the death penalty. Juror, Eldon Gourley is excused because of reasons stated to the Court upon Examination.

At this time, the jury panel is continued during the Noon Recess and this cause is laid over to 1 o'clock.

The Noon Recess being over, and it now being 1 o'clock, the trial in this cause is resumed and now comes the defendant, by counsel, and leave of Court first had and obtained, dismisses Louis Miller, Ben Griffin, Leon Wade and Jim Harris, as witnesses and for whom Writs of Habeas Corups Ad Testificandum have previously been

issued and Sheriff is ordered by the Court to notify the Warden thereof and not to produce said witnesses so dismissed therein.

Whereupon, the jury is challenged, selected and sworn to try the issues herein, and trial by jury proceeds and progresses in the hearing of the evidence in this cause. Now [54] comes the Prosecuting Attorney for the State, leave of Court first had and obtained, and asks and is granted the rule on witnesses. Opening statement is made by the State. Now comes the defendant herein and waives his opening statement.

Now at this time, the Court learns of newspaper being read by the jury carrying an account of the trial, during the supper recess, and upon examination of the jury by the Court, and upon the Motion of defendant, by counsel, a mis-trial is declared herein in this cause.

It is ordered by the Court that this cause be continued for this term and is ordered set for the week of July 18th, 1955, for trial herein.

Now at this time, the defendant being under sentence to the Missouri State Penitentiary on another charge and having been sentenced thereto and now being under sentence of confinement therein, and because the Court feels and determines for security reasons that the jail and facilities of this county are not, or may not prove to be adequate, the defendant is ordered remanded to the Missouri State Penitentiary, to await trial herein and upon orders of this Court for his return for trial, to this Court. It is further shown that the defendant personally requests his return to the State Penitentiary to await trial herein.

And thereafter to-wit: On the 5th day of July, 1955, [55] the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 389) Tuesday, July 5th, 1955, Regular July 1955 Term

---

Now on this day, it is ordered by the Court that a Special Venire of twenty-five (25) jurors be ordered to complete the panel of jurors in this cause.

And thereafter to-wit: On the 14th day of July, 1955, the following order was entered of record:

Miscellaneous Record, Circuit Court, Butler County, Missouri Thursday, July 14th, 1955, In Recess, (Book 10, page 458A)

Now on this 14th day of July, 1955, in vacation of Court, Petitions for Writ of Habeas Corpus Ad Testificandum and by the defendant for Woody Burnett, John Reid, Donald Lyons and Marvin Crabtree, same is taken up by the Court, and after due consideration by the Court, it is ordered that said petitions be sustained and writs are ordered to issue therefor to the Warden of the State Penitentiary for their production in this Court during the trial of this cause, beginning on July 18th, 1955.

Subpoena Duces Tecum for Mr. Joseph Lamar, a custodian of Identification Section of the Missouri State Penitentiary to bring records of Clarence Dietzel and Joseph Lamar, including [56] days employed and employment records for October and November, 1954, all payments made and vouchers of any expense during said months and all records of Walter Lee Donnell, including personal records and classification records and his death certificate, is hereby ordered upon the application of the Defendant.

And thereafter to-wit: On the 18th day of July, 1955, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 426) Monday, July 18th, 1955, Regular July 1955 Term

---

IN THE MATTER OF THE JURY:

Now on this day, comes the Sheriff of Butler County, Missouri, and files his report of Special Venire in the case of State of Missouri vs James William Stidham, Case No. 3158.

Now on this day, this cause is called by the Court, and comes the Prosecuting Attorney of Cole County, Missouri, for the State, and comes the defendant herein, in person and by his counsel, Mark Murray Hennelly, and said parties announce ready for trial.

Jurors Flanigan, Cecil Hayes, Belva Hayes, Rhodes, Pigg, Anderson, Faith and Johnson are excused by the Court for failure to qualify on the death penalty. Geneva Arrington excused by the Court upon her request. Oliver Chambers excused [57] because of a hearing defect and Troy Pruitt excused because of his health. Venire of 30 Jurors is completed. Thereupon challenges are made of the jury and comes now a jury summoned herein to-wit: Orville Clark; Clarence Davidson; T. M. Walton; Eugene Barker; John Sparkman; Elvis Hinton; Sam Stilley; Clyde Crawford; James Sentell; Lloyd Surber; Connie Fredwell and Herbert Gaebler, (12) good and lawful men from the body of Butler County who are duly selected, impaneled, and sworn to well and truly try the issues now joined herein and a true verdict render to the Court in accordance with the Law and the evidence in the case, and trial by the jury proceeds in the hearing of the evidence.

[58] BE IT REMEMBERED, that on the 18th day of July, 1955, the above entitled cause came on for trial before the HONORABLE RANDOLPH H. WEBER, Judge of the Circuit Court of the 33rd Judicial Circuit, Poplar Bluff, Missouri, and a Jury, and the following proceedings were had:

An opening statement was made by Mr. Riley.

MR. HENNELLY: The Defendant will reserve an opening statement [59] until the close of the State's Case.

THE COURT: The record may show that Defendant's opening statement is reserved until the close of the State's Case. Who do you have first?

MR. RILEY: Call Sergeant Nash.

SERGEANT E. V. NASH,

BEING SWORN, TESTIFIED:

Direct Examination, by Mr. Riley

Q. Will you state your name please? A. E. V. Nash.

Q. By whom are you employed? A. State Highway Patrol of Missouri.

Q. What is your rank sir? A. Sergeant.

Q. Where are you stationed? A. At General Headquarters at Jefferson City, Missouri.

Q. How long have you been on the Patrol Sergeant? A. Thirteen years.

Q. Were you in the Penitentiary on the morning of September 23, 1954? A. Yes, sir.

Q. Were you in B Basement? A. I was.

Q. What was your employment prior to going on the Patrol Sergeant?

[60] MR. HENNELLY: Object to that Your Honor, that would be totally irrelevant—

THE COURT: What would be the purpose Mr. Riley?

Q. Just to identify him, it don't make any difference.

THE COURT: All right, sustained. I thought maybe it was in connection with some discussion.

Q. Will you mark this Exhibit 1?

Reporter marked Exhibit 1, a plat.

Q. Sergeant, I show you what has been marked as State's Exhibit No. 1, and I will ask you to identify that. A. That is a drawing I have made of the B basement of the State Penitentiary.

Q. And that correctly shows the physical setup there in the basement? A. Yes, it does.

Q. Does it show the various windows and doors? A. Shows the various doors. I eliminated the windows from the sides.

Q. Is that the physical make-up of B basement on the morning of September 23, 1954? A. Yes, it does.

Q. If the Court please, at this time, we offer Exhibit 1 into evidence.

MR. HENNELLY: Object and except to the introduction of the exhibit, State's Exhibit 1, because it is hearsay and no proper [61] foundation has been laid for its introduction at this point, and it contains certain elements of hearsay and there has been no foundation laid as to the time, place and circumstances under which it was made, and there is certain writing and indications on the exhibit which in and of themselves are hearsay, and to introduce it under this situation would be a violation of the Constitutional rights of this Defendant.

THE COURT: I believe the exhibit should be further identified as to directions and measurements and matters contained in these legends here and notations, so that this witness, this Court may determine whether or not this witness knows those things to be a fact, and then I will further consider the acceptance in evidence of this exhibit.

Q. Did you make the measurements in the basement? A. Yes, sir, I did.

Q. And at the time you made these measurements, the physical structure was the same as it was on September 23rd? A. Yes, sir.

Q. Now, are those measurements reflected that you made, are they reflected on this chart? A. Yes, sir, they are.

Q. And you have some figures here, 17, 18 and some on up to 32, what do they represent? A. That indicates the numbering of the cells.

THE COURT: Are those the numbers they bore on that date?

[62] A. Yes, sir.

THE COURT: All right.

MR. RILEY: And do you have notations here?

A. Yes, sir.

Q. Does that represent the separations between the cells? A. Yes, it does.

Q. Is that correctly shown in this writing down here? A. Yes, sir, it is.

THE COURT: Does that represent the separation between all of them?

A. Yes, sir.

Q. Separating the same? A. The separation is the same, yes, sir.

Q. And you have a notation here, now does this, as to cell bars, is that the same entire length? A. Yes, it is.

Q. And you have a notation here as to metal screens, are they the same measurements on all cells? A. Yes, sir, they are.

Q. You have a number here, No. 1, 2 and 3, are they explained here in your writing below? A. Yes, sir, they are.

MR. HENNELLY: Certainly object to that section as being a conclusion, if Your Honor please, and object to the form of that question, whether or not they explain it, and it invades [63] the province of the jury, and it is hearsay.

THE COURT: May I see it please? I didn't read what was on there. Well, I think the information ought to be testified about, rather than— He can tell whether he put that on this plat.

Q. All right. Now Sergeant, as you look at this plat, in this direction, which way is that facing? A. Generally east.

Q. And which way is this? A. That would be south.

Q. And this? A. North.

Q. And this? A. West.

Q. Anything else?

THE COURT: Yes, the objection was made to his statement with reference to the legend which he hasn't testified about. There are statements there as to the measurements, etc., and he hasn't testified about those measurements, what is contained in that legend on the bottom.

Q. Now, this legend down here Sergeant, did you determine the information contained in Item 1 on this legend? A. Yes, I have had occasion to go through each of the gates and I know it takes a different set of keys to go through.

Q. Now, on Item No. 2, did you measure the doors? A. Yes, sir, I measured them both opened and closed, and also the area that is stable, that is not movable.

[64] Q. Now, on Item No. 3, did you measure the distance from the steel bar enclosure, to the entrance wall? A. Yes, sir, I did.

Q. Did you measure—

THE COURT: What is that distance?

A. That is four feet sir.

Q. On Item No. 4, did you measure the distance from the front of the cell door to the exterior wall? A. Yes, sir.

Q. What is that distance? A. Nine feet and four inches.

Q. And on Item No. 5, did you measure the cells? A. Yes, sir, they are nine feet deep and seven feet and three inches wide.

Q. Now, is that all the information that is contained in this writing down here? A. Yes, sir, it is.

MR. HENNELLY: I am renewing my objection for the reasons heretofore stated. I think it was totally unnecessary for the officer to make the writing on here that he made. I think he could have looked at the exhibit without this and told them what the differences was, by just giving the measurements. However, under the circumstances, when he put down his own conclusions, and not only with respect to the keys, but with respect to everything else, that is only an attempt to [65] bolster his own testimony and his writing becomes immaterial and irrelevant to any point in the case.

THE COURT: Overruled, and it may be received in evidence.

Exhibit 1, being a plat, having been received in evidence, and same being too large to attach to this transcript, a photostatic copy of same is attached to the original of this transcript.

MR. RILEY: Will you mark this Exhibit 2?

Reporter marked Exhibit 2, a photograph.

Q. Sergeant, I will show you what has been marked as State's Exhibit No. 2, and ask you if you can tell the Court what that is? A. That is the entranceway from B and C Halls down to the basement of B basement.

MR. HENNELLY: I don't mean to interrupt you, but could you speak a little bit louder please.

A. All right, sir.

Q. Is that photograph a fair representation of what it portrays there? A. Yes, it is.

Q. And is that, does it show the scene as it existed on September 22nd and 23rd, 1954, in the penitentiary? A. The physical structure is the same, but the debris and water that was on the floor has of course been cleared away.

Q. We offer this exhibit in evidence.

[66] MR. HENNELLY: May I, for the purpose of the record, and for saving time, may I ask you to hold up introduction of them and I can make a general objection to all of them. I will make it now, if you want me to, but I thought it would save time.

Q. All right. Mark this Exhibit 3, and this Exhibit 4, and this Exhibit 5, and this Exhibit 6, and this Exhibit 7.

Reporter marked Exhibit 3, a photograph.

Reporter marked Exhibit 4, a photograph.

Reporter marked Exhibit 5, a photograph.

Reporter marked Exhibit 6, a photograph.

Reporter marked Exhibit 7, a photograph.

Q. Hold it down so they can't see what is on the back. Sergeant, I hand you what has been marked as Exhibit 3, and can you tell the Court what this is? A. Yes, that is the main gate entrance to B basement.

Q. Does that photograph show, correctly show that gate? I mean as it exhibited on September 23, 1954? A. Yes, it does.

Q. Sergeant, I show you what has been marked State's Exhibit No. 4, and can you identify that? A.

Yes, that is the gateway leading into the Death Row side of B basement.

Q. Does that correctly show that gate and all its physical features? [67] A. Yes, it does.

Q. At the time of September 23, 1954? A. Yes, it does.

Q. I show you Exhibit No. 5. A. That is a picture of the area outside of the barred steel cage that is surrounding the cells on Death Row side of B basement.

Q. Does that correctly show that area as it existed on the morning of September 23, 1954? A. Yes, sir, it does.

Q. I hand you Exhibit No. 6. A. That is the gate or the doorway leading down inside of the cells of Death Row in B basement.

Q. Does that correctly show the physical features of what it portrays there? A. Yes, it does.

Q. As of the time September 23, 1954? A. Yes, sir.

Q. I now hand you Exhibit No. 7. A. That is a picture of the area inside the steel barred cage that surrounds the cells on Death Row in B basement.

Q. Does that correctly show the physical features of that area that it portrays there as it existed on the morning of September 23, 1954? A. Yes, sir, it does.

[68] Q. At this time we offer in evidence, Exhibits 2, 3, 4, 5, 6 and 7,

MR. HENNELLY: The defendant will object and except to the introduction of State's Exhibits 2, 3, 4, 5, 6 and 7, for the reason that they are hearsay and a proper foundation has not been laid for their introduction and to introduce them under these circumstances would be a violation of the Constitutional rights of the defendant, particularly in the light of the testimony of the officer that they do not represent the condition as it existed on the night in question, for the reason that they fail to show

certain debris and things which were then present on the night in question.

Q. The fact that the debris is not shown in the pictures doesn't change the physical structure, if that is the purpose of this.

THE COURT: The objection may be overruled and they may be received in evidence.

Exhibit 2, being a photograph, having been received in evidence, is attached to the original of this transcript.

Exhibit 3, being a photograph, having been received in evidence, is attached to the original of this transcript.

Exhibit 4, being a photograph, having been received in evidence, is attached to the original of this transcript.

Exhibit 5, being a photograph, having been received in evidence, is attached to the original of this transcript.

[69] Exhibit 6, being a photograph, having been received in evidence, is attached to the original of this transcript.

Exhibit 7, being a photograph, having been received in evidence is attached to the original of this transcript.

THE COURT: Now gentlemen, are you going to hand these to the Jury now?

Q. Yes, sir.

THE COURT: In looking at these exhibits here that are going to be handed to you, just a minute, the pictures, there are some legends on the back, and that is not in evidence, that information is not in evidence, so don't turn them over, just look at the picture part of them. If there is any further objection to that, I could have those legends taped over, but the notations have nothing to do, at this particular time, with this trial, and they are only being introduced for the actual picture side. I wonder, inasmuch as Exhibit 1 is already in evidence, as you hand these exhibits to the Jury, if the witness might designate on the chart where the particular picture is that is being intro-

duced into evidence, for instance Exhibit 1 I believe is, 2 I mean, is the stairway to B basement, as it has been identified now, can you point out on this Exhibit 1, the chart over there where that stairway is that is represented in this picture?

A. Yes, sir, I can.

THE COURT: All right.

[70] A. The picture that you see will be of this stairway that is to your left and to my right, leading into B basement area.

THE COURT: All right, hand that to the Jury. I believe you might identify the location of the next one.

A. The next one has been described as the main door into B basement. This area is that area in which this main gate or main doorway of B basement is located.

THE COURT: All right, hand that to the Jury.

A. Exhibit 3, this picture that you have, will be a picture of this gateway that leads into Death Row side of B basement right here.

THE COURT: All right, you may hand it to the Jury.

A. The next picture is a picture of the area outside of the steel barred area, it runs the entire area of the cell block clear down to the end of the cells. It is outside of the barred area. This next picture is the gate or the cell door that permits entrance to the area inside of the barred area so that you could get to each of the individual cells on Death Row side.

THE COURT: All right, you may hand it to the Jury.

A. This last picture shows the area on the inside of this barred area, and it also shows a mesh hardware cloth that extends two feet out from the front of the cell into the—and the entire height of the cell block there. That is inside [71] of this barred enclosure.

THE COURT: All right, you may hand it to the Jury.

MR. RILEY: Sergeant, I direct your attention to this up here on Exhibit No.1, will you tell the Jury what this line is made up of?

A. This line here which is on the picture here, dots and dashes, is made up of steel bars that extend the height of the cell areas and they extend from this gate entrance the entire length of the cell block area, and to this point here where they connect onto the concrete abutment.

Q. Now, on the top side or the north side of this—what are those, what is that Sergeant? A. This side of the cell block is made up of the same number of cells, sixteen cells, and on this side are segregated the negro inmates during the time of innoculations and until they are put out into the population of the prison.

Q. Now, this whole area as is referred to as B basement, is it actually underground? A. No, sir, B basement is not underground. There is a basement underneath B basement.

Q. I believe that is all at this time.

Cross-Examination by Mr. Hennelly

Q. Sergeant Nash, on the night in question, the night of the riot, that you went into B basement, when was the last time [72] prior to that time that you had been in B basement? A. I was not in the basement the night of the riot.

Q. You didn't go down there at all the night of the riot? A. The night of the 22nd, no, sir.

Q. So that you cannot testify then of your own knowledge with respect to what the conditions were on the night of the riot, can you? A. As of the night of the 22nd, no, sir.

Q. Yes. A. No, sir.

Q. Did I understand you to say that the State's Exhibit 1 reflected the conditions as they existed on the night

of the 22nd? A. Just the physical structures of the building.

Q. You weren't there the night of the 22nd, were you? A. I was at the penitentiary, but not at B basement.

Q. This State's Exhibit is supposed to portray the conditions as they existed in B basement and you weren't down there, is that right? A. I was not down in B basement that night.

Q. Under the circumstances, I am going to ask that it be withdrawn and I renew my objection for the reason that no proper foundation has been laid for its introduction.

THE COURT: The witness, as I understood him to testify, said he was there on the morning of the 23rd, is that correct?

A. Yes, sir.

[73] THE COURT: And had you ever been in there before?

A. I have been in the penitentiary prior to the 22nd.

THE COURT: In B basement before?

A. Yes, sir.

THE COURT: You had been in there before and you were there the day after?

A. Yes, sir.

THE COURT: And the physical structures of B basement were the same on the 23rd as it was the time you were in there before?

A. Yes, sir.

THE COURT: In other words, the building, they didn't tear the building down or change the walls or anything of that kind, did they?

A. The general physical structure of the basement was the same.

THE COURT: The same as it was, the same as you found it on the morning of the 23rd, and the same as it had been as you had found it once before?

A. Yes, sir.

THE COURT: When you were there?

A. Yes, sir.

THE COURT: The objection is overruled.

MR. HENNELLY: When was the last time, prior to the morning of the 23rd, that you were in that basement?

[74] A. Several times prior to then. I had a case to go to the penitentiary to secure records to complete our files at General Headquarters.

Q. The basement Sergeant, had you been in B basement prior to that time? A. As to the exact date, I do not remember.

Q. Had you ever been in B basement prior to that time? A. Yes, sir, I had.

Q. Now then Sergeant, you indicated that this picture properly reflected the conditions as they existed, at least this State's Exhibit 1, as it existed on the morning of the 23rd? A. Yes, sir.

Q. I am going to call your attention to that office which is marked here "Christian Science Chapel", was there a Christian Science Chapel office in there on the morning of the 23rd? A. That room is designated for that particular use.

Q. Was it, was that what it was used for on the morning of the 23rd? A. It wasn't being used for that purpose that morning, there wasn't any office in use that morning down there.

Q. As a matter of fact, that which you have now marked as the Christian Science Chapel office was on the night of the 22nd, and the morning of the 23rd, and for sometime prior to [75] the 22nd, 1955, 1954, really a classification room, wasn't it? A. They sometimes use one office or another. I don't know specifically which one they used all the time.

Q. Well now, when did you make this up? A. That picture was made up sometime prior to the 1st of June, as I remember it.

Q. Sometime prior to the 1st of June, of 1955? A. Yes, sir.

Q. Would you say that it was made at least six months after the night of the 23rd, 22nd rather? A. Approximately.

Q. Now then Sergeant, on the morning of the 23rd, what time approximately did you arrive there? A. The morning of the 23rd?

Q. Yes, sir. A. I had been there all night.

Q. On the night of the 22nd, were you outside of B basement? A. Yes, sir, I was the night of the 22nd.

Q. All right. Now, on the night of the 22nd, when was the first time that you arrived on the scene of the riot itself? A. Five minutes after seven.

Q. Five minutes after seven, and who did you arrive there with? A. Trooper Volkmer.

Q. And you at no time prior to midnight, got into B basement? [76] A. No, sir, I did not.

Q. And when in the morning of the 23rd did you get into B basement? A. It was prior to noon, I would say maybe ten-thirty or eleven-thirty.

Q. At that time, had all the inmates been cleared out of there? A. What do you mean by cleared out?

Q. Were there any inmates in B basement at all when you first arrived on the morning of the 23rd? A. There may have been some of the trustees, most of the inmates had been put back in their proper cells.

Q. Well, when you indicated that there was some difference with reference to debris and rubbage, was that all there on the morning of the 23rd? A. Yes, sir.

Q. Was it still there at ten-thirty and eleven when you got there? A. Yes, sir.

Q. I want to call your attention to these cells which you have marked on here, going from 17 at the rear of

State's Exhibit 1, and going to 32, which would be the cell which would be near the front door, am I not correct in stating that Sergeant? A. Yes, sir.

[77] Q. I will ask you if you can tell the Court and Jury to the best of your knowledge, how many inmates were in those cells when you arrived about ten-thirty on the morning of the 23rd? A. I did not go down Death Row, that side, that morning.

Q. You didn't go down Death Row side? A. No, sir.

Q. Did you go down, proceed at any point past that front door on the morning of the 23rd? A. I didn't go past this front gate entrance here.

Q. Well now then, with respect to the condition as it existed on the morning of the 23rd, in the back of this front door, you don't know, because you weren't back there? A. I did not go back in there.

Q. Did you go back there at anytime prior to the time that you made this picture, this exhibit? A. Yes, sir, I have.

Q. When was the first time that you went back there? A. I am not certain as to how soon after the 23rd. I was in and out of there several times. I wouldn't remember.

Q. Now then, when you told the Court that this State's Exhibit 1 reflected the conditions in B basement as they existed on the morning of the 23rd, that isn't exactly accurate either, is it? A. Yes, it is to the best of my knowledge.

Q. You weren't back there though, were you? [78] A. I was in B basement, and that is a picture of the B basement area.

Q. Were you back in anywhere past cell No. 32? A. No, sir.

Q. You didn't go back there, did you? A. No, sir.

Q. So that whatever was back there on that morning, you didn't see it, did you? A. No, sir, not in the cells.

Q. Your Honor, I am again going to renew that objection.

THE COURT: This witness has testified now two or three times that the plat that he has made which is Exhibit 1, is the physical characteristics of the building. Now, he has indicated on there the thickness of the walls and where the doors were and things of that kind. Those matters don't change. That is part of the building. The objection is overruled.

MR. HENNELLY: Save an exception.

THE COURT: Now he has testified there was debris and rubbage and things of that kind on the morning that he got down there, but this plat is being received in evidence and the Jury and the Court and the witnesses might better enable themselves to follow the testimony of the witnesses, as to directions and places that are being and will be referred to in evidence. Certainly the exhibit can't do anything but be helpful in the [79] explanation and the understanding of the testimony. Now the witness hasn't testified as to what condition the doors were in or what the condition of the bars may have been or whether anything was torn up and things of that kind, but as to the physical characteristics, Exhibit 1, as I understood this witness, it actually reflects the floor plan of that building.

A. That is right, sir.

THE COURT: Overruled.

Q. Your Honor, might I say this, I certainly want the Jury to have everything that is helpful also.

THE COURT: All right, proceed then.

Q. On the other hand—

THE COURT: I have overruled your objection Mr. Hennelly.

Q. Now, when you got there on the night in question, where did you first go at the Penitentiary? A. Are you referring to the night of the 22nd?

Q. The night of the 22nd. A. When I first arrived at the penitentiary I stopped at the main intersection leading into the penitentiary to clear the traffic way there for other cars that were approaching. After a few moments there directing traffic I placed Trooper Volkmer in charge of the traffic assignment and I went up on the wall, No. 3 gate at the penitentiary.

Q. (Out of the hearing of the Jury) I am going to ask the [80] Court to strike from the record, and instruct the Jury to disregard the Court's remarks with respect to the purpose for which Exhibit 1 was being introduced, for the reason that it may have left the Jury with the impression that I was attempting to keep something from them which was going to be helpful and it puts the defendant in a bad light with the Jury and it was made certainly in good faith, and in light of the continued statements of the officer that he wasn't back there, and my understanding was that the Exhibit must reflect the conditions as it existed at the time the crime was committed, my objection was certainly made in the best of faith, and I think that the Court's statement might leave the impression that I was trying to be sharp and trying to keep something from them and under those circumstances, I don't think it should have been made in the presence and hearing of the Jury and I ask that it be stricken and the Jury instructed to disregard it, and that a mistrial be declared.

THE COURT: Well, of course Mr. Hennelly, you made your objection in the presence of the Jury, and you have made that same objection three times, and the Court was merely explaining why he was overruling your objection. Any inferences in your statement as to what the Court's intentions were, of course, without foundation, and this Court didn't have any intention of implying to this Jury or to anybody else that there [81] were any sharp practices being used by anybody. I was merely answering

your objection. I will make an explanation to the Jury at this time. Your objection and request is overruled. Gentlemen of the Jury, during the trial of a lawsuit there are many matters of evidence and procedure which come up from time to time which parties have a right to object to through their counsel, and the fact that the Court may sustain or overrule an objection is not any reflection upon any one party participating in this lawsuit, and the rulings that the Court makes regarding any of these matters are not to be considered by the Jury as any reflection or any intimidation or any reprimand or any denial of any of the rights of any of the parties. I ruled a while ago upon an objection and attempted to explain to counsel my reasons for that ruling, and I want to state at this time that the Jury is not to draw any inferences from the statement made by the Court. If there is any direction to the Jury, I will call your attention to it at the time, and of course will direct the Jury in the matter of instructions at the conclusion of the case, so with that explanation you may proceed Mr. Hennelly.

Q. Now Sergeant Nash, I want you to take your little ruler. To what scale have you set that State's Exhibit 1? A. Approximately one inch to eight feet.

Q. One inch to eight feet? A. Yes, sir.

[82] Q. Now, I want you to take that and tell the Court and Jury what is the distance from the first door as one comes down those steps until one gets immediately in front of the first door which would lead in? A. You have reference to this gate here?

Q. Yes. A. Taking from the stairway to the center of that first entrance way, approximately eighteen feet.

Q. So that taking the shortest possible distance, one entering that front door and going to the first gate, the first place where there is a lock, would have to walk approximately eighteen feet? A. That was taken from the center

of the stairway, not the edge, the edge would make it shorter.

Q. When you say center of the stairway— A. That is from this point to the center of the stairway placing the ruler there and placing it to the center of the gate.

Q. Taking your answer with respect to eighteen feet, have you already come down the steps then? A. Yes, I am leaving the bottom step going to the gate.

Q. How far do you have to walk coming down the steps? A. That is approximately eleven feet.

Q. Now then, how—hold it up so the Jury can see it Sergeant, will you show the Court and Jury, after one gets into [83] that first door, where would one have to go to to get to the second door? A. Go from No. 1 doorway to the No. 2 doorway.

Q. Now Sergeant, with respect to the method in which your exhibit is drawn, if one were standing in front of door No. 1, which direction would you be looking? A. You would be looking, if you were looking toward the cell area, you would be looking generally east.

Q. And if one were standing in front of door 2, and just looking straight ahead, in which way would one be looking? A. Standing in front of door No. 2 and looking down toward the bottom of the picture, you would be looking generally south.

Q. Now, tell the Court and Jury the distance that one would have to go to go from door 1, to door 2? A. The center of door 1, to the center of door 2 approximately eight feet?

Q. Eight feet? A. Yes, sir.

Q. Now, door 1, is that opened with just a large key, or how many locks are on door 1? A. Door 1 is opened with a large key.

Q. Door 2? A. Two is opened with a large key.

Q. Now, there is a third door? A. Yes, sir.

Q. How far would one have to walk to go from the second door [84] to the third door? A. Distance from No. 2 to No. 3 is approximately ten feet.

Q. Now, at the time that you arrived there approximately 10:30 on the morning of the 23rd, where was the first place that you found an attendant of the penitentiary guarding a door, was it at door 1, 2 or 3? A. The night of the 22nd?

Q. You weren't there the night of the 22nd Sergeant, the morning of the 23rd? A. The morning of the 23rd, I don't remember ever finding an attendant from the penitentiary.

Q. Who was with you when you got down there? A. There was approximately fifty to seventy-five officers, St. Louis Police and other officers from different surrounding places.

Q. How did you get in then, did someone have a key? A. I didn't go in past this area here.

Q. Very well. Now then Sergeant, I want you to look at a point which you have marked on there as a wash basin, would you point out to the Court and Jury and tell them where that is? A. Right over here is the toilet and shower room. There is no wash basin pictured on there.

Q. Do you know of your own knowledge now whether or not there was a wash basin of any kind, after one gets past either door, [85] 1, 2 or 3? A. Yes, there is one.

Q. Point it out to the Court and Jury. A. There is a wash basin located approximately at this point, after you come inside of Gate No. 2. It is sitting right about there at the end of the rule.

Q. Now, can you give us any description of that wash basin? A. Nothing other than it is just a wash basin.

Q. Well, is there a light in there of any kind? A. I don't remember if there is or not.

Q. Now then, with respect to the cells themselves, numbering from 17 to 32, are those all cells Sergeant, or is there something besides inhabitable cells there? A. I think that they have made cell 22, as I remember, I may be wrong, but I believe that it is cell 22 that they made into a shower room.

Q. Now, have you indicated on this picture anything about a shower room? A. No, sir, I was just drawing the general structure of the building.

Q. Was there a shower room there when you were there, the last time you were there? A. Yes, sir.

Q. And is it a shower room, which is the general type of shower room, with the general plumbing fixtures of a shower [86] room? A. As I remember it, yes.

Q. And I believe you indicated that that was in, to the best of your knowledge, in 23? A. 22.

Q. 22, I am sorry. A. As I remember, yes.

Q. Do you know whether or not it was in working order on the night of the 22nd, and the morning of the 23rd? A. I had no occasion to check it sir.

Q. Now Sergeant, I am going to ask you with respect to your investigation of this case, when was the first time after the night of the 22nd, or the morning of the 23rd, that you saw the defendant, James Stidham? A. I think that I saw Stidham the evening of the 23rd.

Q. The evening of the 23rd? A. Yes, sir.

Q. Where was he at that time? A. He was brought to the classification office, which is across from the Deputy Warden's office.

Q. That is not in B basement is it? A. Administration Building.

Q. Administration Building proper? A. Yes, sir.

Q. Did you at anytime see the body of Walter Lee Donnell? A. I did not.

[87] Q. Now, when he was brought to the classification room of the Administration Building, did you bring

him or did one of the guards or one of your fellow officers bring him, if you recall? A. As I remember, I think that he was brought by prison authorities. I do not remember for sure.

Q. Now, how far is the Administration Center Building, if you can recall, from the B basement? A. It is approximately a hundred yards.

Q. In which direction? A. East of the Administration Building.

Q. What was the purpose of brining him to that point, if you know? A. We knew that he, as well—

Q. This part Your Honor is going to be hearsay, I will withdraw the question. The officer was going to incorporate—

THE COURT: All right.

Q. Did you question him at that time? A. We talked with him.

Q. Who was with you at that time? A. There was Lieutenant Barton and myself and there may have been another officer present.

Q. Was there an officer there by the name of Curtis, out of Kansas City? A. Not at the time I was talking with Mr. Stidham, no, sir.

[88] Q. And do you know how long he was questioned on the night of the 23rd, in that classification room? A. Fifteen or twenty minutes.

Q. Was he handcuffed at that time? A. As I remember, I don't beleve he was. I am not for sure though.

Q. You know who did the questioning? A. Primaily, Lieutenant Barton.

Q. And after that questioning was completed, where did you take him? A. He was turned again over to the prison authorities.

Q. And you don't know whether or not he went back to his regular cell from where he came or not? A. I don't know where he was taken, no, sir.

Q. When was the next time after the night of the 23rd that you saw the Defendant Stidham? A. I think it was at their arraignment in Jefferson City.

Q. You had nothing to do then with any subsequent questioning of this defendant, is that right? A. That is right.

Q. You weren't present at any of the subsequent questionings? A. No, sir.

Q. No further questions Your Honor.

THE COURT: Any further questions by the State?

MR. RILEY: I think that is all.

[89] MR. HENNELLY: I want to ask one more question. You recall testifying here in this case here in this court room in April of this year, you recall the last time you were on the stand here in this Court House?

A. Yes, sir.

Q. You recall at that time whether or not you testified that you questioned him after the night of the 23rd, that you had questioned him on the 25th and 26th, do you recall whether or not you testified to that? A. I don't remember the dates that I might have mentioned.

Q. Let me ask you this, did you question him on the morning on one occasion? A. No, sir, I did not.

Q. I have no further questions.

Redirect Examination by Mr. Riley

Q. Sergeant, do you recall Mr. Hennelly even asking you about questioning Stidham the last time you were here? A. As I remember the question asked me on the previous time, was he asked me when I had seen Mr. Stidham and as I remember, I testified then it was at his arraignment in the Cole County Court.

Q. That is all.

[90] *Recross-Examination by Mr. Hennelly*

Q. I will ask you if it isn't a fact that the last time you testified here in this case in this Court Room, that

you did testify No. 1, that you had questioned him in the classification room, and that you had questioned him more than once in the classification room? A. No, sir, I do not remember making that statement.

Q. Do you say today Sergeant that you did not testify that you questioned him at all in the classification room? A. No, I didn't say that. We did talk to him in the classification room.

Q. I am sorry, do you say today that you did not testify in this Court, before this Court the last time, that I questioned you about the matter, that you questioned him in the classification room after the night of the 22nd? A. It is possible that I might have, but I don't remember that statement.

Q. No further questions. That is all.

MR. RILEY: Thank you sir.

LIEUTENANT W. S. BARTON,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. Would you state your name please? A. W. S. Barton.

Q. And you are a Lieutenant in the Missouri State Highway Patrol? [91] A. Yes, sir.

Q. How long have you been with the Missouri State Highway Patrol? A. Something over fifteen years now.

Q. How old are Lieutenant? A. Forty-five.

Q. What was your occupation befcre—

MR HENNELLY: I object—

Q. I withdraw the question if he is going to object.

THE COURT: All right.

Q. I will ask you if you went to the Missouri State Penitentiary in Cole County, Missouri, on September 22nd, 1954? A. Yes, sir, I did.

Q. What time did you arrive there? A. Ten P.M.

MR. HENNELLY: I am sorry officer.

A. Ten P.M.

Q. Did you go to the area in the Penitentiary known as B basement? A. Yes, sir.

Q. What time approximately? A. Ten-thirty.

Q. What did you find? A. I found a building and the doors considerably damaged, and a lot of debris lying around and some of the cells open and some closed and some men in them, and I found a body.

[92] Q. Where did you find the body? A. Cell 18.

Q. Is that Cell 18 in Death Row? A. Yes, sir.

Q. Will you mark this Exhibit 8.

Reporter marked Exhibit 8, a photograph.

Q. Sergeant, will you describe the body that you found there?

MR. HENNELLY: I didn't get that Mr. Riley.

Q. Will you just describe the condition of the body that you found? A. I found a body, a man's body lying in Cell 18 on the back, with the head to the north and northeast corner of that cell, feet toward the door, which would be the southwest direction. The head was considerably mutilated, large indentation in the right side of the head near the temple. The eyeball was completely out of the socket.

Q. Which eye was that? A. The right eye setting out on top of the socket and the clothes were disturbed or torn or cut or something of that nature, and considerable blood all over the area, cell, the walls and the individual clothing also. I felt of the pulse to see if the subject had any life in him, and at that time it had become stiff and rigor mortis had set in, at least the body was beginning to get stiff, and I was then unable to determine any life in the subject, and so I left the cell at that time.

[93] Q. Did you check the serial number, and how was this subject dressed? A. All of the inmates—

Q. No, how was this one dressed? A. I checked his serial number of his clothes with the serial number of the officials of the Penitentiary.

MR. HENNELLY: I object to that, that will be hearsay, and ask that it be stricken and the Jury instructed to disregard it.

THE COURT: As I understand this witness' testimony, he is just telling what he did.

Q. That is right. You say you checked—

MR. HENNELLY: Your Honor is right, he hasn't yet said what happened as a result of—I withdraw the objection.

A. I checked the number on his clothing with the record, the official records of the Penitentiary, and revealed who the subject was. That is the way they kept track of all of that.

THE COURT: Go ahead and ask your next question.

Q. I will ask you Lieutenant, take a look—what was the number that was on the clothing of this subject found in the cell? A. 64078.

Q. And I will ask you to take a look at State's Exhibit No. 8, and can you identify that?

[94] MR. HENNELLY: Excuse me, I am certainly going to object to—you are only asking him to identify it?

Q. Yes.

MR. HENNELLY: I am sorry, go ahead.

A. Yes, this is a picture of the subject I found in Cell 18 the night of the 22nd of September.

Q. Will you tell the Court that that is the same man? A. Yes, sir.

Q. At this time we offer in evidence State's Exhibit 8.

MR. HENNELLY: Object and except to the introduction of State's Exhibit No. 8 for the reason that it is hearsay and no proper foundation has been laid for its introduction and to introduce it under these circumstances would be a violation of the Constitutional Rights of the Defendant, and is totally immaterial and irrelevant to any point at issue in this case.

THE COURT: Overruled, it may be received in evidence. You may hand it to the Jury.

Exhibit 8, being a photograph, and not being in the hands of the Reporter at the time this transcript is being prepared, will either be attached to the transcript, if same is furnished the Reporter before the transcript is completed, or else same can be had from counsel for Plaintiff.

Q. Will you mark this Exhibit 9.

Reporter marked Exhibit 9, a sledge hammer.

Q. Lieutenant, I will ask you to look at State's Exhibit 9, and [95] tell the Court and Jury, you know what that is? A. Yes, sir.

Q. When was the first time you saw that? A. I found this in Cell 18 in Death Row, alongside of the body that I found down there the night of September 22nd.

Q. Alongside of the body of the man you just identified as being in this photograph? A. Yes, sir.

Q. Now, do you know the weight of that sledge hammer? A. Sixteen pounds.

Q. How large was the indentation on the skull of Walter Lee Donnell? A. Oh, it was, covered an area of two or three inches in diameter, in this area here, maybe more. I would say it was larger than that. Three to four inches in area. The whole side of his face there was mutilated.

Q. Mark this Exhibit 10.

Reporter marked Exhibit 10, a photograph.

Q. I hand you what has been marked Exhibit 10, and will ask you if you know what that is? A. Yes, sir.

Q. Were you present when that photograph was taken? A. Pardon?

Q. Were you present when that photograph was taken? A. Yes, sir, I was.

[96] Q. It wasn't taken in September, 1954? A. No, taken afterwards, after that date.

Q. Lieutenant, can you tell the Court and Jury whether or not that photograph, what that is a photograph of? A. This is a photograph of Cell 18 in Death Row, and also shows some others, but shows a very good picture of the front part of the front door and only door rather of Cell 18.

Q. Now, does that show, correctly show the conditions as they existed at 10:30 on the night of September 22nd, 1954? A. No, sir, it does not.

Q. Now, what is the difference, show the Court if you will Lieutenant. A. The Jury?

Q. No, the Court first.

THE COURT: No, me.

A. The partition of each cell out from the wall immediately in front of the cell, there is a partition with a heavy galvanized wire on it that protrudes out at the wall to keep anything from being handed from one place to the other, from one cell to the other. Now, that night there was a large hole in this screen wire and it was torn down and hanging down. That has since been removed, since this picture was taken.

Q. Now,— A. Before this picture was taken.

Q. Now, except for the fact that this photograph doesn't show [97] all the screen there, and on the night of September 22nd, this photograph would have shown, had it been taken on that night, would have shown the screen in there, but torn down? A. Yes, that is right.

Q. Now, is that the only thing in the physical structure there? A. Yes, I believe that about covers it,

outside of the water and debris and other things laying around on the floor.

Q. At this time we offer State's Exhibit No. 10.

MR. HENNELLY: Defendant will object and except to the introduction of Exhibit 10, for the reason it is hearsay and for the reason that no proper foundation has been laid for its introduction, and for the reason that there exists on the picture a—some person who apparently is placed in a particular position, and that is leading and suggestive and is hearsay, and it may tend to confuse and mislead the Jury and under the circumstances, I object to it.

THE COURT: Does this figure of a man have any particular significance in this case? There is a picture of a man on Exhibit 10.

A. Yes.

Q. And at this particular point that man is standing in front of Cell— A. 18.

Q. 18? A. Yes.

[98] THE COURT: All right, the objection is overruled, and it may be received in evidence.

Exhibit 10, having been received in evidence, being a photograph, is attached to the original of this transcript.

Q. Lieutenant, at the time this photograph was taken, where were you? A. I was in Cell 17.

Q. Now, will you explain to the Jury, hold that photograph up, and tell the Jury how much of the screen there could you see from Cell 17?

MR. HENNELLY: Object to that if Your Honor please, for the reason that that is totally irrelevant, immaterial to any point in issue, and invades the province of the Jury, and is a conclusion.

Q. That is all right, I will show it at a later time.

THE COURT: All right. The Court would permit this witness to testify what he can see from Cell 17 if he wishes.

Q. All right, go ahead. A. This is Cell 17 over here. This is Cell 18 here, with the man standing directly in front of it. And by getting up next to the bars and laying your head close to the bars, you can see the back portion of this man, the back of his shoulders and his shirt and trousers, on down to his feet. Now, he is standing with his toes within twelve inches of—or fourteen inches of the door itself, into the cell. These [99] partitions that protrude out from the wall of the cell block there are two feet wide, which this screen wire is fastened onto. Now, if he was to move back any distance at all—

THE COURT: That would be a conclusion.

Q. We ask that that be withdrawn Your Honor.

THE COURT: He can tell what he saw at that particular place.

MR. HENNELLY: Under those circumstances, I am going to ask that all that testimony be stricken and the Jury instructed to disregard it, and a mistrial be declared up to the point where Your Honor stopped him, for the reason it was a conclusion, it is hearsay, totally irrelevant and immaterial to any point in the case, and invades the province of the Jury, and don't take into consideration a lot of other factors that was in there.

THE COURT: This witness is testifying that standing in the cell, just what on this particular picture he can see, and he has stated where his position was, and what he was able to see as shown on this picture, and I think he is entitled to that testimony, and that testimony is admissible in evidence, and that objection will be overruled.

MR. RILEY: (Out of the hearing of the Jury). I want the record to show that I have refrained from asking this witness who was in Cell 18 at the time this photograph was taken.

THE COURT: Cell what?

MR. RILEY: 18, at the time this photograph was taken, for the [100] reason that at that time, the Defendant, James William Stidham was in that cell, and that he was celling in there at the time this photograph, particular photograph was taken. I will ask the witness that and make that offer of proof now. I don't want it to go to the Jury.

MR. HENNELLY: I say that don't make any difference, who the man was in that cell. That is not the part of my objection.

MR. RILEY: It certainly can't be hearsay.

MR. HENNELLY: The heart of my objection is that the whole thing is totally irrelevant and immaterial. You are proving what somebody else saw.

THE COURT: I don't know what they are going to try to prove. There may be other testimony that is introduced. I don't know. I presume that as testimony develops there will be some significance connected with this. It can't all come in at one time. And this witness may testify and explain the matters as he has already explained it, and the Court has already ruled on it, and the objection is overruled.

Q. Who else did you find in Death Row that night? A. The subject of Sammy Reece, Doc Booker, and a man by the name of Eaton, and a man by the name of Ford, and a man by the name of Creighton.

Q. Where was Creighton? A. He was in Cell 17, the eastern most cell of that tier of cellblocks.

Q. Will you turn around Lieutenant to Exhibit No. 1 on that [101] chart, and point to Cell No. 17? A. Right here is Cell 17.

Q. And where was Cell 18? A. Right next to it.

Q. Cell 18 is where you found the body? A. That is right, sir.

Q. 17 is where Creighton was? A. That is right, he was in this cell here, the end cell.

Q. Now, was the door to Cell 18 open or closed? A. It was open.

Q. And how did you find the door to Cell 17? A. It was locked.

Q. And did you finally get into Cell 17? A. Yes, sir.

Q. How? A. I got the keys from a subject by the name of Ford, who was in his cell locked up, and I don't know which one it was, but it was up in here.

Q. What time, about what time was it when you got Creighton out? A. It must have been eleven o'clock, maybe later, that I got him out of there. I would say in the neighborhood of eleven. It took quite a little bit to get the lock undone.

Q. Going back to the sledge hammer, what did you do with the sledge hammer? A. I took the sledge hammer and locked it up in the Deputy [102] Warden's office. I later taken it to our laboratory and turned it over to our laboratory.

Q. Who did you turn it over to? A. Sergeant Rhodes.

Q. And was Lieutenant Williams there at the time? A. Yes, Lieutenant Williams was there.

Q. And is that sledge hammer in the same condition now as it was at that time? A. Except that it doesn't have as much blood on it as it had at that time.

Q. Now, did you go through all of the cells in Death Row that night? A. I checked them. I didn't go in them.

Q. Did you find Rollie Laster? A. No, he wasn't in there.

Q. Did you find the Defendant, James William Stidham? A. No, sir, he wasn't in there.

Q. Did you find any other wounds or marks on the body, other than the injury to his skull? A. Well, I didn't take any of his clothes off to look, no, sir.

Q. Well, as to the parts of the body that was exposed? A. The part that I could see was his head. That didn't have clothing on it.

Q. What about his neck? [103] A. Well, I mean this part above his shirt, yes, I could see his neck.

Q. Was there an injury to his throat and neck? A. Yes, his throat had been cut.

Q. You will have to speak louder. A. His throat had been cut, yes, sir.

Q. How large? A. Quite a gash across there.

Q. Well, indicate to the Jury. A. I would say three or four inches across here.

Q. On which side? A. It was on this side.

MR. HENNELLY: The left side?

A. I believe it was this side, the right side, the best of my memory.

Q. You said right, and you are pointing to the left. A. Well, I still say it was this side.

MR. HENNELLY: I am going on for the purpose of clarification Your Honor, so we know which side—

THE COURT: He has pointed to the left side.

MR. HENNELLY: Pointed to the left side.

Q. That is all at this time.

Cross-Examination by Mr. Hennelly

Q. Lieutenant, you have been in the State Highway Patrol for some years now, is that right? [104] A. A few years.

Q. In the course of that time, I suppose you have had reason and opportunity to see a number of people who have suffered violent death, have you? A. Yes, sir.

Q. You have seen a number of people who were deceased, and you have examined a number of dead bodies, have you? A. Yes, sir.

Q. In the course of your vast experience with the Department? A. That is right.

Q. I understand that at the time you found this body, that the body was stiff and rigor mortis had set in? A. I am no specialist in that, but he had begun to get stiff.

Q. He had begun to get stiff? A. Yes, sir.

Q. Based on your experience that you have had, in examining other bodies, and having seen other bodies, where rigor mortis had set in, is it your opinion that rigor mortis had set in to this body?

MR. RILEY: If the Court please, this man is not a doctor, and for rigor mortis to set in, in some bodies takes longer than others. I don't know that this man can—

THE COURT: Sustained. The witness has stated that he wasn't an expert, except that the body had begun to get stiff. He didn't know what it was.

[105] MR. RILEY: A body may begin to get stiff and still not be rigor mortis.

MR. HENNELLY: I ask that that be stricken, if Your Honor please.

THE COURT: All right, it may be stricken. As previously stated, remarks of counsel that are not connected with questions that are being asked the witness, are not testimony in the case, Gentlemen of the Jury.

Q. Now then Lieutenant, I believe that you arrived there about ten o'clock that night? A. In front of the Penitentiary.

Q. In front of the Penitentiary? A. Yes, sir.

Q. And looking, if you will Lieutenant, at State's Exhibit 1, which is that plat in back of you there, when was the first time that you entered that building? A. I judge it was around ten-thirty.

Q. Around ten-thirty? A. Yes, sir.

Q. And I will ask you Lieutenant, looking, if you will, at the front part of State's Exhibit 1, which indicates some steps next to a plumber's room, and steps next to the Protestant Chapel, Protestant Chapel office, were there

any State Patrolmen outside of that door, or those doors which lead down those steps? A. Outside of the building?

[106] Q. And would you say whether or not they had set up something of a barricade out there? A. No, the officers set up no barricade. The steps were barricaded by the inmates.

Q. Now, tell us what you mean by the barricade, and where was it situated? A. This shows steps going down from the first floor level to the basement. It doesn't indicate the steps coming from the B and C cell blocks lobby outside. That would be in this area if it was so indicated.

Q. Excuse me, do I understand that there are some steps which are not reflected on this State's Exhibit 1? A. Yes, sir, from the lobby, as I stated before, from B and C cell blocks, coming to the outside part of the building. This shows the steps coming down into the basement.

Q. So that those steps which you refer to are not steps which would be on this section of the plat at all, is that right? A. What do you mean by section?

Q. Well, would those steps, would those steps come down into any point which is shown on State's Exhibit 1? A. They would come down to an area right here, right even with where these start down.

Q. So that the end of those steps are the beginning of these, is that right? [107] A. You have to turn after you come down these, you turn to the right or to the left, to get in on these steps here to get into the basement.

Q. Now, which way would those steps run? A. They would go from the north to the south upward.

Q. From the north to the south upward? A. Yes, sir.

Q. Now, were those steps barricaded? A. Yes, sir.

Q. Who had barricaded them? A. I don't know, the inmates I presume. They were the only ones in there.

Q. Now then Lieutenant, when you arrived there, who did you have with you? A. I had, I didn't have anyone with me when I arrived at the Penitentiary.

Q. When you arrived at B basement, who did you have with you? A. Trooper Finney Ward.

Q. And at that time, were there any inmates outside of those who were locked in their cells, were there any inmates in the outer section of the vestibule there? A. No, sir, there was not an inmate in this area.

Q. Now, as you come down those steps, were there any lights on down there? A. Not in this area right here.

[108] Q. Where was the first place that you saw a light after you got in there? Did you see any lights? A. Yes, there was, I believe there was a light on right in this area right here. I believe there was a light there screwed into the wall, as I remember it. And I don't recall of any other lights being on back in this area. However, it was very light.

Q. Was it necessary for you to proceed with a flashlight? A. I used a flashlight.

Q. Now then, these doors, looking at Door No. 1, was that open when you got there? A. Yes, sir.

Q. And door 2, was that open? A. That was open.

Q. And 3, was that open? A. It was open.

Q. So that you had proceeded without being molested, or without any stop of any kind, into those three doors? A. Outside of debris and stuff of that nature, and water, I wasn't stopped.

Q. Was there a considerable amount of water and debris? A. Lots of watermelons and sticks and chairs and everything.

Q. Lot of broken chairs? A. I wouldn't say a lot of them, but there were pieces of that sort of stuff laying around.

[109] Q. And was there pieces of that cluttering up that area way as one comes down from 32 to 17? A. No, there was a lot of water in this area here.

Q. Did you at anytime that evening, investigate the source of that water? A. Not there.

Q. Sir? A. No, not there.

Q. Was it a condition which indicated to you that the water was still running when you got there? A. No. I am sure it didn't accumulate anymore after the high rise.

Q. Can you give the Court and Jury any idea as to how deep that water was? A. It would vary because of the fact that the floor isn't level all the way through, and some places it is worn off more than others, and there would be deeper spots.

Q. Very well. At the deepest point would it be above your ankles? A. No, I wouldn't say it was. I wouldn't say it was that deep. I got my feet wet, but I don't believe I went over my shoes.

Q. Now then, I believe that you indicated that the keys were missing when you first got in there, is that right? A. What do you mean by missing?

Q. I mean you had to get the keys from somebody, didn't you? [110] A. Yes, I made an inquiry as to who might have the keys.

Q. Now, you got the keys from Mr. Ford, is that right? A. Yes, sir.

Q. A colored inmate? A. He is.

Q. Did you have some difficulty in getting them from him? A. No.

Q. Did he tell you at first that he didn't have them? A. That is right.

Q. And did you persuade him to give them to you? A. I said I had information that he had them, and I wanted them.

Q. And he just handed them over to you? A. He gave them to me.

Q. Is that the way it was? A. Yes, sir.

Q. Now then, it wasn't necessary for you to use any other type of persuasion? A. No, sir, none whatsoever.

Q. Now then Lieutenant, where was the first place you went after you got those keys? A. I went back and tried to get Creighton out of his cell. He was in such a condition, I felt like it was necessary to get him to a hospital.

Q. All right. Now then, I want you to look at State's Exhibit 1, which is this plat, and I believe you indicated previously that [111] Creighton was in Cell 17, is that right? A. That is right.

Q. Look, if you will, at this exhibit Lieutenant, and tell us where in that cell you first saw Creighton? A. I went down in the cell that he was standing hollering and yelling for help, and he was right up next to the bars, next to the front.

Q. Would you say at that time, let me ask you this. Strike that. In the course of the time that you have been with the State Highway Patrol, I suppose you have had plenty of opportunity to see people in hysteria, have you? A. Yes, sir.

Q. Would you say that Creighton was in a hysterical condition when you arrived there? A. He was injured, he was hurt.

Q. All right. Now, did you see some marks on him which indicated that he had been hurt? A. Yes, sir.

Q. Where was he marked? A. On his head and teeth and jaw and hand.

Q. Based on your experience in the Department, and bodies that you have seen, and people that you have seen that were injured, would you say that he had sustained

considerable injury prior to the time that you had arrived there? A. Yes, I would say he had.

[112] Q. Very well. Now then, did you first get Creighton out of his cell before you did anything else Lieutenant, or did you go to Donnell's cell before you got Creighton out? A. I, on my way down the corridor inside the cell cage in here, I checked the other cells to see that they were locked first, and then I found this one, naturally, because I come to it before I did Creighton's, and then I checked Creighton's and couldn't get him out, because I couldn't get the door open, and had nothing to open it with, and then I returned back here and checked this other side, which is the isolation ward, more or less, for new prisoners, and then returned back here. I didn't want them to rush me from the rear or something of that nature, and I seen that these were all secured, and I came back, immediately back here and got the keys from Ford and proceeded to let Creighton out.

Q. Do I understand that before you left, even knew Creighton was there, you had first looked into Cell 18? A. I knew somebody was back there because I could hear him holler and hollering for help, and that was my aim, as I proceeded down here, checking all these cells before I got to him, I run onto Donnell's body.

Q. So that you stopped at least and looked at Donnell's body before you ever found Creighton, is that right? A. That is right.

Q. Did you spend some time there at Donnell's body [113] A. Didn't take very long. I don't think I was in there over thirty seconds.

Q. You were in there thirty seconds? A. Yes, sir.

Q. Now, at that time, where was Creighton? A. Still in his cell.

Q. Was he back in his cell? A. Oh, he was up there, you could tell by then that it was an officer.

Q. Now, after you came back, did you first get Donnell's body out of there before you did anything about getting Creighton out? A. I didn't remove Donnell's body from there at all. While I was getting Creighton out of his cell, Donnell's body was removed.

Q. Would you say that all in all, you only spent those thirty seconds in Donnell's cell? A. I don't believe over thirty seconds, or a minute at the most. I had no reason to spend any more time in there.

Q. And that was, did you ever see that body after that time? A. No. I seen it to the front.

Q. That is the last time you saw that body? A. Yes, sir.

Q. You saw it for thirty seconds, and that the eyeball was hanging out there and that there was a big gash on the head, and [114] the lights were out, because you had to use a flashlight, and you tell the Court and Jury that there isn't any question in your mind, but what that man, that the man that you saw there was the man whose picture is shown in State's Exhibit 8? A. That is right.

Q. Is that right? A. That is right.

Q. In that thirty seconds—you—is that when you looked at his neck and these other marks on him? A. That is right. It didn't take any time to do that.

Q. Still had the flashlight, did you? A. That is right, but there was other lights. I didn't take—

Q. Was there any other lights that was on back there either in the vicinity of cell 17 or 18? A. Not that I recall, in the building, but there was lights coming from the fire.

Q. Coming from the fire? A. Yes, sir.

Q. But you did have your flashlight on didn't you? A. Yes, that is right, I had my flashlight.

Q. Now then, did you incorporate any of your findings with respect to the condition of that body, in any report which was given to the Vital Statistics Bureau for Cole County? A. I don't know whether they got it or not.

[115] MR. RILEY: If the Court please, I presume that Cole County has got a Vital Statistics Bureau, and the records would be the best evidence.

THE COURT: Sustained.

Q. I am sorry, I withdraw it. I will rephrase the question. You were the first man to find the body and you were in charge there that night, weren't you? A. I don't know, no, I wasn't in charge.

Q. Well, let me ask you this, did you at anytime submit to any authorities in Cole County, either to the Penitentiary authorities or to the Vital Statistics Bureau, any information with respect to the condition of the body when you found it? A. No, sir.

Q. You did not? A. No, sir.

Q. Did you at anytime make out a report indicating that the man had been shot? A. No, sir.

Q. You did not? A. No, sir.

Q. Did you at anytime after the time that you had found that body, have reason and opportunity to inspect a death certificate on that body? A. No, sir.

Q. Very well. Now then, how long did you stay there that night Lieutenant? A. I was inside the Penitentiary all night.

[116] Q. You were in there all night? A. Yes, sir.

Q. And when was the first time, after you had arrived there on the night in question, that you saw the Defendant, James Stidham? A. I saw him, oh, it was during the night, I don't know what time it was.

Q. And where did you see him? A. He was standing out just off of the lobby on the same floor level, on the B side of the cell blocks.

Q. And would the position you saw him be indicated on State's Exhibit 1 there? A. I can't do it there.

Q. You mean— A. That isn't what I am talking about. That isn't the floor level I am referring to.

Q. Tell us with respect to that State's Exhibit 1, where was he, was he upstairs or outside? A. He was upstairs above this.

Q. All right. Did you question him or talk to him at that time? A. I had no reason to.

Q. Did you question or talk to him at anytime after the night of the 22nd? A. I talked to him on the night of the 23rd.

Q. Now, where was that questioning, where did that questioning [117] take place? A. In the Classification Room, just off of the large tunnel across from the Deputy Warden's Office.

Q. You know what time of the day or night that was? A. Well, I judge it to be around about—between eight and nine, somewhere in that neighborhood, sometime after we had gone to work.

Q. Now, the Classification Room Lieutenant, is there furniture in there? A. Yes, there is seven or eight chairs and a table.

Q. I would defer for a moment to the State, if they want to offer this, and won't object to it Your Honor.

THE COURT: Are you intending to offer it?

MR. RILEY: I might as well, and let the Jury see it.

THE COURT: You might have it identified, was it marked?

MR. RILEY: Mark it Exhibit 11.

Reporter marked Exhibit 11, a photograph.

Redirect Examination by Mr. Riley

Q. Lieutenant, I will show you what has been marked as State's Exhibit 11, and will you tell the Court and Jury what that is? A. Yes, this is a photograph of the Classification Room.

Q. Does that correctly show the physical features of that room? A. Yes, sir.

[118] Q. On September 23, 1954? A. Yes, sir, it does.

Q. We at this time offer Exhibit No. 11.

MR. HENNELLY: No objection.

THE COURT: It may be received in evidence.

Exhibit 11, being a photograph, having been received in evidence, is attached to the original of this transcript.

THE COURT: I believe we will take a recess at this time Gentlemen. Now during the recess, you will be taken up to your Jury Room, and don't discuss this case among yourselves. Of course nobody is supposed to talk to you and there won't be anybody able to get to you up in this Jury Room, in the Jury quarters. They are available for the Jury, but during the recess of this Court, and when you go to the Jury Room, don't discuss the case with anyone or permit anyone to talk with you about it. Now, I think we have a pitcher of ice water and the Sheriff's office, one of the deputies will bring some ice water up to you, for you. I think they have some cups up there and you can have a drink of ice water. The Court will be in recess for a few minutes.

The Court recessed at 3:00 P.M. until 3:15 P.M.

Recross-Examination by Mr. Hennelly

Q. Now Lieutenant, I am going to show you what has been accepted in evidence as State's Exhibit 11. At the time you [119] questioned the Defendant Stidham, was it in that room that is reflected on State's Exhibit 11? A. That is right.

Q. And at the time he was brought in was he seated at that table? A. Yes.

Q. And at that time was he handcuffed, if you know? A. No, sir.

Q. And how many men were there questioning him at that time? A. Well, I don't recall, five or six of us.

Q. And was he sent back to his cell then? A. That is right.

Q. And when was the next time that you questioned him? A. I never did talk to him anymore.

Q. You never did question him again? A. No.

Q. Was that the last time you had anything to do with Stidham personally, with respect to your handling of this case? A. Outside of conveying him back and forth to Cole County Court House.

Q. Aside from that? A. Yes.

Q. Very well. Now then, with respect to this, which has already been accepted in evidence as State's Exhibit—

THE COURT: I don't believe it has been referred to as an exhibit.

[120] MR. RILEY: Exhibit 9.

Q. Is it your testimony that that was found in one of the cells on the night of 22nd? A. Found in cell 18.

Q. In cell 18? A. Yes, sir.

Q. Taking into consideration the front part of the cell, where did you find it? A. As I stated before, the body was lying on its back in a northeast southwest direction, which would put his head closer to the east wall and the sledge hammer was right near his shoulder and the wall. Just a very short space there.

Q. Now, I believe there was considerable blood on this, isn't that right? A. Yes, sir.

Q. And considerable blood all over the walls in that cell, is that right? A. I don't know about all over the walls, it was particularly on the back wall and east wall.

Q. Back wall and east wall? A. Back wall and east wall.

Q. Was there blood on the ground? A. Well, there is no ground there.

Q. I mean— A. That is the floor.

Q. On the basement? A. Tile floor, and it was covered with [121] water and partly covered with water and blood in there on the floor and water together.

Q. Now, can you tell the Court and Jury, is there a bed in that cell? A. I believe that cell just had a mattress in it at that time.

Q. As a matter of fact, all those cells only had a mattress on the floor? A. No, that isn't right.

Q. That isn't right? A. No.

Q. In that cell, he was on a mattress? A. Best I can recall, it was a mattress in there, but there could have been a bed, a very low bed, but I don't believe so.

Q. Now, I believe that you indicated that you took this out of here, you took this, which has already been marked Exhibit 9, out of the cell, and that you then put it in the Deputy Warden's office? A. Taken it up there and locked it up in a locker after marking it for identification.

Q. Isn't it the custom and the practice of the State Highway Patrol to take evidence over to the Headquarters? A. When they get it together.

Q. Well, you had that didn't you? A. That is right, but I had other things to do besides lugging [122] that sledge hammer around all night.

Q. When was the next time you went and got it Lieutenant? A. It was the following day, I believe it was, that I took it to, could have been a day or two later. I knew where it was, because it was locked up. I wouldn't say just whether it was the next day or not.

Q. Was it locked up with a number of other sledges? A. No, sir.

Q. Was it in a place all by itself? A. Yes, sir.

Q. Where was it? A. In the Deputy Warden's office.

Q. Was it in a cabinet of some kind? A. Yes, sir, a cabinet or a little safe.

Q. Sort of a cabinet or safe, whatever you want to call it? A. Yes, sir.

Q. Was there a combination on it? A. No, a padlock on it.

Q. Padlock? A. Yes.

Q. Then you took it over to Headquarters, is that right? A. That is right.

Q. Now, that is a section of the State Highway Patrol, which is given over to laboratory analysis of things, isn't that right? A. Yes, sir.

Q. And I believe that the State Highway Patrol has a section [123] for the handling of the identity, identification of blood and blood specimens and finger prints and things of that kind? A. Yes, there is a laboratory.

Q. Now, I am going to ask you what is the physical difference on this exhibit besides the blood, from the night that you first saw it? A. I put two pieces of paper on it, and wrapped this here tape around it, because handling it, this handle was splintered, and I didn't want to get splinters in my hands.

Q. Was it splintered or broken when you first saw it? A. Yes.

Q. I am sorry? A. Yes.

Q. And this, was it all in one piece when you found it? A. Just like that, with exception of that, which I indicated.

Q. All right. When did you put the tape on it Lieutenant? A. When I taken it from the Deputy Warden's office to the Penitentiary.

Q. When you took it— A. From the Deputy Warden's office to the lab I mean.

Q. You know what date that was? A. I won't say for sure, but it couldn't have been but a day or two, after I found it.

Q. No further questions.

[124] *Redirect Examination by Mr. Riley*

Q. Lieutenant, when you got the keys from Ford, where was he? A. Where was Ford?

Q. Yes. A. He was in one of these cells right in here. I couldn't tell you positively which cell he was in.

Q. Was his door open or closed? A. No, sir, his door was closed and locked.

Q. Now, Lieutenant, you said that you could see down in there, how could you see?

MR. HENNELLY: Object to that, that question is too vague and indefinite and speculative, and calls for a conclusion.

Q. You said you had a flashlight? A. Yes, I used a flashlight part of the time. It wasn't necessary for me to use the light to get around with, but to look.

Q. Was there any other lights down there? A. Yes, there was considerable light coming into the building, but as I stated before, I believe there was one light burning right up here, was all that I recall. There could have been another dim light down in there somewhere, but I don't recall it.

Q. Well, was there any other light coming from anyplace? A. Yes, sir, there was. The back of the building here, the [125] cellblock which is the east end of it, twenty-five feet I would say to a building that was burning, and it threw light into the building here and back in this area back up here, there was a building burning which was reflecting considerable light in these windows along here. There was windows along in there, and that reflected right into the cell.

MR. HENNELLY: Object to that, and ask that that be stricken and the Jury instructed to disregard it, and a mistrial declared. It is a conclusion and self-serving statement.

THE COURT: Do I understand your testimony, you are testifying where the light was and where it came in?

A. Yes, sir.

THE COURT: As you saw it and observed it on this particular night?

A. That is correct.

THE COURT: Overruled.

Q. Now, what are the floors made of in the hallways there? A. The floors in there are tile, white tile. The walls are white, glazed brick, and all around the floors and the walls are white tile.

Q. Mark this Exhibit 12.

Reporter marked Exhibit 12, a photograph.

Q. Lieutenant, I hand you what has been marked as State's Exhibit No. 12, and ask you if you can tell the Court what that is? [126] A. Yes, sir. This is a hole, or part of a hole dug in the side of the wall.

Q. Is that a picture of the wall? A. This is a picture of the wall in B basement.

Q. Now, did you examine that wall that evening? A. Yes, sir.

Q. That night? A. Yes, sir.

Q. I will ask you if that photograph correctly represents the condition of that wall as you saw it that night? A. Yes, sir.

Q. Now, will you indicate on Exhibit No. 1, where that wall is? A. This wall in this photograph is this wall right here known as the Christian Science Chapel office, this wall right here, and this photograph is just about the middle of it, right in here.

Q. Lieutenant, will you tell us whether or not that photograph, which side of the wall is that photograph taken from? A. This photograph was taken from inside of this small room, and it would be the west side of this wall here.

Q. Be the part of the wall that is outside of B basement? A. That is right.

Q. I believe that is all sir.

[127] *Recross-Examination by Mr. Hennelly*

Q. Just one question Lieutenant, this State's Exhibit 10, which you have already identified, and which has been

introduced into evidence, do I understand correctly that with you standing in the corner of cell No.—which one were you in? A. 17.

Q. Of Cell 17, which was the cell that you found Creighton in, isn't that right? A. That is right.

Q. That all you could see from the man, of the man who was standing in that position in front of Cell 18, was his back, is that right? A. That is right, the back portion of him.

Q. The back portion? A. Standing like this man is here.

Q. There was nobody poking at you, you were just standing there? A. That is right, I was up here looking in.

Q. And you were at that time in good physical condition, you didn't have any broken jaw or anything like that, did you? A. No.

Q. No further questions.

MR. RILEY: That is all. Call Sergeant Rhodes.

[128] SERGEANT JAMES RHODES,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. Will you state your name please? A. James Rhodes.

Q. Mr. Rhodes, you are a Sergeant of the Missouri State Highway Patrol? A. Yes, sir, that is right.

Q. How old are you sir? A. Twenty-nine.

Q. How long have you been with the Missouri State Highway Patrol? A. Little over six years.

Q. And where are you stationed? A. Jefferson City, Missouri.

Q. And in the general headquarters? A. Yes, sir.

Q. Are you in the laboratory there? A. That is correct.

Q. Where did you go to school Sergeant? A. I went to Westminister College at Fulton, Missouri.

Q. How long did you go to Westminister? A. Four years.

Q. What did you major in? A. Chemistry.

Q. Did you receive your degree in Chemistry? [129] A. Yes, sir.

Q. After you graduated from Westminister, what did you do? A. I worked for approximately six months with Presnite Engineering Company at St. Louis.

Q. What kind of work did you do? A. I worked in a laboratory.

Q. What type of work are you now doing for the Missouri State Highway Patrol? A. I am assigned to our technical laboratory in Jefferson City.

Q. You make various examinations? A. Chemical analysis.

Q. Chemical analysis? A. Yes, sir.

Q. Have you had any experience in analyzing bloodstains? A. Yes, sir.

Q. Have you read any text books on that question since you graduated from school? A. Yes, sir.

Q. What textbooks have you read?

MR. HENNELLY: For the purposes of the record, I will admit his qualifications in the field in which he concerns himself with in the laboratory.

THE COURT: They can be admitted unless counsel wishes to further qualify him.

Q. If he admits it, admits that he is qualified for that [130] purpose.

THE COURT: Do you admit that he is qualified for making surrological tests?

MR. HENNELLY: Yes, sir.

Q. I hand you what has been marked as Exhibit No. 9, and ask you if you have ever seen that instrument before? A. Yes, I have.

Q. Do you recall when you first saw that? A. Yes, I first saw that on September 30 of last year when Lieutenant Barton brought it to the laboratory.

Q. Did you make an examination of that sledge hammer for the presence of bloodstains? A. Yes, sir.

Q. What, can you tell this jury what you found? A. I found there were extensive red colored stains present on the head of the sledge hammer, and I made examination of those and they were identified as human bloodstains.

Q. Did you analyze those stains according to chemical analysis? A. Yes, sir.

Q. And they were human bloodstains? A. That is correct.

Q. Did you make any identifying marks on that hammer? A. Yes, sir, I did.

Q. That is the same hammer you examined? A. Yes, sir.

[131] Q. That is all.

Cross-Examination by Mr. Hennelly

Q. Sergeant Rhodes, how long have you been with the laboratory? A. Well, ever since I began working for the Highway Patrol.

Q. Now Sergeant, does the Police Laboratory of the Highway Patrol in Jefferson City, does it concern itself also with fingerprint identification? A. Yes, we do fingerprint work.

Q. And I believe you make chemical analysis of various materials which would be subjected to you for the purpose of identification? A. That is right.

Q. Now, I will ask you in this case, did you have an opportunity to make an examination of any materials under the fingernails of one Walter Lee Donnell? A. No, sir.

Q. Now, with respect to your findings, that there was human blood on this exhibit Sergeant, that is the first step in any analysis of any instrument or exhibit, which might

be given to you with material on it which appears to be blood, isn't that right? A. Yes, sir, that is right.

Q. The first thing you do is to determine whether or not it is human blood? [132] A. Well, first, we determine whether or not it is blood, and then if it is, whether it is human blood.

Q. That is right. Now after you determined it was Human blood, am I correct in stating that there are steps which are taken after that in breaking down the blood into the various types under a certain system which you have in the State Highway Patrol? A. Yes, we can check stains to determine the blood group.

Q. Now, what system do you use in determining that, the International Grouping, Sergeant? A. Yes, in grouping the stains, we group them according to the four main blood groups.

Q. Tell, the Court and Jury what those four are? A. The most common group is Group O, and then Group A, and Group B, and Group AB.

Q. Now, within those four classifications, within your experience in the laboratory, in dealing with blood specimens, you can break that down still further, can't you? A. That is the only breakdown that we make on the dry blood stains.

Q. Well, is there such a thing as an M factor, within one of those groups? A. Yes, sir, there are M and N factors.

Q. M and N factors? A. Yes, sir.

[133] Q. So that one might be a type O with an M or an N factor, either present or absent, isn't that right? A. I believe that is correct.

Q. So that would give you, enable you to break it down more than just by making a general analysis with respect to the fact that one might be one of those four groups, isn't that right? A. Yes, sir, that is correct.

Q. All right now, I will ask you with respect to the M and N factors, are there any other methods whereby you could break it down? A. Well now, it depends on the condition of your blood specimen. Now, as I say, we just group on the dry stains as to the four main blood groups. Now on your blood, dry stains, there is the RH factor, and PN factor, and they can't be accurately determined on dry stains, so we just group our four main blood groups.

Q. Do you at anytime, do you ever forward blood either to Dr. Gradwahl in St. Louis to proceed further with a blood examination? A. I don't recall of any cases right offhand sir, no.

Q. Let me ask you this, has it ever been, within your experience that you have broke down a dry bloodstain, beyond the four broad classifications? A. No, sir, I have not.

[134] Q. Can that be done by anybody in your laboratory? A. Not that I know of. We don't do that.

Q. Who is the Lieutenant in charge of the laboratory? A. John Williams.

Q. Does he do blood work also? A. Yes, sir.

Q. Now, I will ask you this, was there ever at anytime in the course of this case, any blood forwarded to you from the body of one Walter Lee Donnell? A. No, sir.

Q. So that your examination of this instrument tells us that there is, first of all, that it is human blood, did you break it down further, can you tell us, can you tell this Court and Jury what blood type is on that hammer, was on that hammer? A. Of the blood grouping determination, it indicated that it was Group O.

Q. Group O? A. Yes.

Q. But you didn't break it down any further with an M and N factor, or anything like that? A. No, sir.

Q. And you didn't forward that to anybody else for the purpose of proceeding further with that? A. No, sir.

Q. Thank you very much Sergeant. No further questions.

[135] MR. RILEY: That is all.

JOE LAMAR,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. Will you state your name please? A. J. G. Lamar.

Q. Mr. Lamar, will you speak as loud as you can, because with the fans, it is difficult to hear. Mr. Lamar, you are employed by the Missouri State Penitentiary? A. I am.

Q. And what capacity? A. Superintendent of Identification Records.

Q. Do you have under your control and supervision all of the records pertaining to inmates in the Missouri State Penitentiary? A. I do.

Q. Do you have there the record as to the time they come in? A. I do.

Q. Fingerprints? A. I do.

Q. Photographs? A. Right.

Q. And the time they go out? A. Right.

Q. Are those records that are required to be kept by law? A. They are.

Q. I show you what has been marked State's Exhibit No. 8, and [136] will you tell this Jury what that is? A. That is a photograph of one Walter Lee Donnell.

Q. Did you know Walter Lee Donnell personally? A. I did.

Q. What was his record number? A. 64078.

Q. Did you see Walter Lee Donnell on the night of September 22nd, 1954? A. I did.

Q. Where was he? A. Across the hall from the Deputy Warden's office in the Classification Room.

Q. And what was his condition? A. He was dead.

Q. How did you determine that he was dead? A. Well, his body was beginning to be stiff already. I knew that he was dead.

Q. You say that was across the hall from the Deputy Warden's office, is that inside of the Missouri State Penitentiary? A. It was.

Q. In Cole County, Missouri? A. Right.

Q. And describe what you observed about Walter Lee Donnell's body at that time? A. His throat was cut in two places.

Q. Now, just what two places were they? [137] A. One on each side of the throat.

Q. Now, you say it was cut, now just describe the wound, will you? A. There was a gash, inch and a half or two inches long on each side, and the flesh was wide open.

Q. What else? A. There was a large hole under the right ear.

Q. What else? A. Right side of the head was mashed in as if it had been hit by a heavy instrument.

MR. HENNELLY: Object to that last section as being a conclusion on the part of the witness, no foundation laid for it.

THE COURT: Well, sustained, as to what caused it.

Q. Just describe what you saw, how big was this area that was mashed in? A. Oh, about three or four inches in diameter.

Q. Just show the Jury what area of his head was mashed in? A. The entire right side, from the cheek bone on up past the ear. It was completely mashed in.

Q. And what about his right ear? A. I described it as a hole under the right ear.

Q. What else did you notice about him? A. Three fingers of the right hand was broken, the tip of the index finger was completely severed and mashed away.

Q. Did you take his fingerprints? [138] A. I did.

Q. What was the purpose of taking his fingerprints? A. For identification purposes.

Q. What print did you use? A. I used the left index finger.

Q. Do you have the print you took at that time sir? A. I do.

Q. Will you mark this Exhibit 13?

Reporter marked Exhibit 13, fingerprints.

Q. Mr. Lamar, I show you what has been marked as State's Exhibit No. 13, and will ask you if you know what that is? A. I do.

Q. Is that exhibit a part of the official records of the Missouri State Penitentiary? A. It is.

Q. And is it made in the regular course of business? A. It is.

Q. Is it made at or about the time of the date stated in there? A. It is.

Q. And is it a correct record? A. Yes, sir.

Q. Those records are made and kept under your supervision? A. They are.

Q. At this time we offer State's Exhibit No. 13.

[139] MR. HENNELLY: The Defendant will object and except to the introduction of State's Exhibit 13, for the reason that it is hearsay and it is in violation of the Constitutional Rights of the Defendant to introduce it in evidence at this time. I do not think, in making this objection, that this is the type of evidence that one can bring under the Uniform Business Records Act, and that this is a type of a technical matter which would leave the door open to all types of hearsay and calls for expert testimony. In addition to that, there are some other matters as conclusions on there, which would be grossly hearsay on the right hand side.

THE COURT: Are you offering it for the pupose of identification?

Q. All purposes, all information shown.

MR. HENNELLY: (Out of the hearing of the Jury) This is a dangerous piece of evidence.

MR. RILEY: You subpoenaed it.

MR. HENNELLY: Where is the original, this is a copy.

MR. RILEY: Yes, the original is in Washington. I withdraw my offer at this time.

MR. HENNELLY: Is the original of this exhibit in Washington on file with the Federal Bureau of Investigation?

Q. Mr. Lamar, is the original copy of this exhibit on file with the F.B.I. in Washington? A. It is.

[140] Q. You sent it there? A. Yes, sir.

Q. This writing on here, is that on the original copy? A. Yes, on the original, that is the carbon copy of it.

Q. Judge, I will withdraw my offer at this time.

THE COURT: This matter here, where I have my finger is what?

A. A print of the left index finger of Walter Lee Donnell.

MR. HENNELLY: I want to ask that that be stricken for the reason that that incorporates certain sections of hearsay as to whose it is, and I think that is hearsay and I think that the Jury having heard it, if they heard it—

MR. RILEY: He testified he put it on there.

THE COURT: The last part of it may be stricken at this time as to whose it is. What is it, that is what I want to know. A. A fingerprint.

Q. It is a fingerprint? A. Yes, sir.

THE COURT: Now, who put that fingerprint on there? A. I did.

THE COURT: You did?

A. Yes, sir.

THE COURT: And from whose hand did you make the print?

A. Walter Lee Donnell's.

THE COURT: And you knew Walter Lee Donnell personally? [141] A. I did.

THE COURT: And then is this the fingerprint of Walter Lee Donnell that you put on there? A. It is.

THE COURT: All right.

MR. RILEY: Mr. Lamar, are you acquainted with Dr. Shull? A. Yes, sir.

Q. At anytime did you identify the body of Walter Lee Donnell to Dr. Shull?

MR. HENNELLY: Object to the form of that question for the reason that is leading and suggestive, and contains certain elements of hearsay and is a conclusion, and ask that it be stricken and the Jury instructed to disregard it and a mistrial declared.

THE COURT: Overruled, and I think the time and place should be fixed.

Q. On September 25, 1954, in Nashville, Tennessee, did you identify the body of Walter Lee Donnell for Dr. G. Donald Shull?

MR. HENNELLY: Object, if Your Honor please, for the reason that this is hearsay and that this is a matter which is something done, not in the presence of this Defendant, and while use of the word identify is a conclusion, and it has been held in other cases that it is a matter which has to be done in the presence of the Defendant, and he has to acquiesce [142] in it some way. I think they may show it in a different way, but to use it under those terms, it is very bad form, and I think it is illegal and improper, and I ask that it be stricken.

THE COURT: The objection is overruled. I think more of your circumstances ought to be shown before your question is asked. Was this witness there? He has testi-

fied that he knows, or knew during his lifetime, Walter Lee Donnell. Now, was Donnell's body there, did he see it and identify it, I think those ought to be asked before the designation to anybody else is made.

Q. On September 25, 1954, in Nashville, Tennessee, did you go to Nashville, Tennessee, on that date? A. I did.

Q. And who was with you? A. Dr. Shull, Mr. Riley, the Cole County Prosecutor.

Q. Now, did you see a dead body there? A. I did.

Q. And whose dead body was it? A. Walter Lee Donnell.

Q. And is that the only body you saw? A. That is right.

Q. And when you were there and observed that body, where was Dr. Shull? A. He was present.

[143] Q. Did he view the body? A. He did.

Q. Were you with Dr. Shull at all times? A. I was.

Q. And whose body was it that Dr. Shull viewed? A. Walter Lee Donnell's.

MR. HENNELLY: Object to that as being a conclusion.

THE COURT: Overruled.

Q. Whose body was it that Dr. Shull viewed? A. Walter Lee Donnell's.

Q. Did you observe Dr. Shull doing anything to the body of Walter Lee Donnell? A. I did.

Q. What did he do? A. Assisted in holding an autopsy.

Q. And did you see him cut the body open? A. I did.

Q. Did you see him examine the head? A. I did.

Q. Was that opened? A. It was.

Q. Were you there all the time? A. I was.

Q. Dr. Shull there doing the work? A. He was.

Q. And you say it was the body of Walter Lee Donnell? [144] A. It was.

Q. Is that the same Walter Lee Donnell that you saw dead in the Deputy Warden's office in the Missouri State Penitentiary? A. It was.

Q. Is that the same one you have identified in Exhibit No. 8? A. It is.

Q. I believe that is all Judge.

Cross-Examination by Mr. Hennelly

Q. Mr. Lamar, are you acquainted with a Mr. McDowell at the Missouri State Penitentiary? A. Yes, sir.

Q. What are his duties up there? A. He is, most of the time, in the identification bureau.

Q. Is he the man who takes the fingerprints from people? A. He is not.

Q. Does he take any fingerprints? A. Not to my knowledge.

Q. You take all the fingerprints? A. I do not.

Q. Now how many, in the coure of time that you have been working for the Penitentiary, approximately how many fingerprints have you taken? A. Well, that is impossible to say. I have been there fourteen [145] years.

Q. Have you taken a thousand? A. Oh, easily that many.

Q. I see. And this one you took yourself, is that right? A. I alsways take the dead ones.

Q. Sir? A. I always take the deceased.

Q. You always take the deceased ones? A. Yes, sir.

Q. Now, I will ask you Mr. Lamar, do you incorporate into that file, and into the records of the Penitentiary, the official death certificate of the County? A. We do not.

Q. In other words—strike that. How many people would you say have died in the Penitentiary in the last two or three years? A. It would just be a guess, I would say two dozen.

Q. And do you incorporate into the files of any of those people the official death certificate for Cole County? A. Not the official death certificate. Their form is always incorporated.

MR. RILEY: If the Court please, I would like to object to that, Cole County doesn't have any death certificates, the County of that size has no Bureau of Vital Statistics.

THE COURT: I am not familiar with that statute. I know the State of Missouri has a Bureau of Vital Statistics. Sustained [146] as to Cole County's death certificate. St. Louis and Kansas City I presume are probably the only two that have it.

Q. Have you incorporated into the files of any of those who have been deceased, the official State of Missouri death certificate? A. We have not.

Q. Will you mark this Exhibit A.

Reporter marked Exhibit A, a death certificate.

Q. I am going to hand you what has been marked for the purpose of identification, as Defendant's Exhibit A, and ask you if you know what that is?

MR. RILEY: If you know.

Q. If you know? A. I don't know.

Q. You don't know? A. Without reading it.

Q. Sir? A. I don't know.

THE COURT: Is that exhibit marked Exhibit A?

MR. EHLERS: Yes, sir.

Q. I will ask you if that isn't a death certificate sir? A. That is what it purports to be, yes, sir.

Q. And is that a death certificate of one Walter Lee Donnell? A. It is.

Q. I am going to ask you if that Death Certificate doesn't reflect that he—

MR. RILEY: If the Court please, what that death certificate reflects, is on the death certificate and I object to him saying [147] what it reflects.

THE COURT: Sustained.

MR. RILEY: Until it has been introduced.

Q. Very well. Have you removed from any of the official records of Walter Lee Donnell, any death certificate? A. We have not.

Q. You have never seen the original of that, nor have you ever filed within your official records, any copy such as that one? A. That has never been done in any case.

Q. Hasn't been done in this one, is what I am asking you? A. That is right.

Q. All right. But in any event, at the time you examined that body, you didn't see any evidence of any bullet wound in him then, did you, in Mr. Donnell? A. None whatever.

Q. No bullet wounds? A. No.

Q. Did you have any conversation with the Sheriff of Cole County with respect to the deceased? A. I did not.

Q. Did you have any conversation with anyone with respect to an official death certificate in the matter? A. I did not.

Q. Very well. Now then Mr. Lamar, just when did you go to [148] Nashville, Tennessee? A. The afternoon of September 25, 1954.

Q. The afternoon of September 25? A. Right.

Q. And how did you get down there? A. By airplane.

Q. And did you catch that plane in Jefferson City? A. I did.

Q. What plane did you take down there? A. The Highway Patrol plane.

Q. Who went with you besides Mr. Riley and the doctor? A. Dr. Shull and Mr. Riley and the pilot of the plane. I believe his name is Jones.

Q. What time did you arrive down in Nashville? A. The Funeral Home at 3:15.

Q. 3:15? A. 3:15 P.M.

Q. 3:15 P.M.? A. That is right.

Q. And did you land at some airport down there or something? A. We did.

Q. And how did you get from the airport out to the Funeral Home? A. We took a cab.

Q. And do you know what time it was that you arrived at the airport? A. No, not exactly.

[149] Q. Did you have to make out any statement or any certificate of any kind, which has been filed with the State Highway Patrol, that you were a passenger on that trip? A. I did not.

Q. Have you brought with you—strike that. How long did you remain down in Nashville? A. All night.

Q. And where did you stay? A. At the hotel.

Q. What hotel?

MR. RILEY: If the Court please, I don't know that that is material to any issue in this case.

The Court: Well, it is cross-examination.

MR. RILEY: Go ahead then.

Q. What hotel did you stay at? A. I believe it was the Jackson.

Q. You registered there under your name? A. That is right.

Q. Have you brought with you Mr. Lamar, some records of your own with respect to any expenditures which were made by you, to the State of Missouri, during the month of September or October, of 1954? A. I brought exactly what you subpoenaed.

Q. And where are they? A. In the other room, I didn't bring them in here.

Q. May we have just a moment to get them please?

[150] THE COURT: I don't believe you subpoenaed a September and October and November, but you may go get them.

Q. May I see them? A. What is it you want to see?

Q. I want to see any voucher of money—

MR. RILEY: I can't hear the defendant's questions, or I mean counsel for defendant's questions.

THE COURT: I don't know that it was exactly a question. I think it was, he was directing him to something in there that he wanted to see.

Q. Let me ask you this, were you reimbursed in any way for any of the money that was spent on this trip? A. I was not. I didn't spend anything.

Q. Who paid the hotel bill down there? A. Dr. Shull I think paid the bill. I am not sure.

Q. And can you tell us what street that hotel was on? A. I cannot.

Q. You say that it was, to the best of your knowledge, the Jackson Hotel? A. I believe that is right, yes.

Q. How long did you stay down there Mr. Lamar? A. I think our plane left ten minutes after twelve Sunday afternoon the 26th, for a return trip to Jefferson City.

Q. When did you return back in Jefferson City? A. To the best of my recollection, around three or three-thirty, [151] something like that.

Q. Three or three-thirty Sunday afternoon? A. It was Sunday afternoon, the exact time I don't remember.

Q. Were you marked as being on detached service out of the Penitentiary at that time? A. Saturday and Sunday are my days off there.

Q. So that there is—is there anything in the records at the Missouri State Penitentiary to indicate that you were out of the city? A. Not to my knowledge.

Q. But the records will reflect that you had registered in at the hotel down there? A. That is right.

Q. And there was no expenditures of any kind paid back to you, either for meals or hotels or for anything, is that right? A. None whatever.

Q. I have no further questions Your Honor.

Redirect Examination by Mr. Riley

Q. Mr. Lamar, this exhibit, State's Exhibit No. 13, is that the only death certificate that you have in the Penitentiary files? A. Of Walter Lee Donnell.

Q. Of Walter Lee Donnell? [152] A. Yes.

Q. Now, you don't work on Saturdays or Sundays, do you? A. Not unless on special duty.

Q. I mean you don't have to check out or in the Penitentiary, or give the Penitentiary notice if you want to go somewhere? A. No.

Q. I believe that is all.

MR. HENNELLY: No further questions at this time Your Honor.

THE COURT: This, which you have designated as a copy of the handwriting on Exhibit 20, is that your handwriting?

A. It is not.

THE COURT: Exhibit 13, excuse me.

A. No, sir.

Q. Did you see anyone write that? A. I did not.

Q. You did not? A. No, sir.

THE COURT: All right, that is all.

MR. RILEY: Call James Eynard.

JAMES EYNARD,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. Will you state your name please? A. James Eynard.

Q. And where do you live Mr. Eynard? [153] A. Jefferson City, Missouri.

Q. And by whom are you employed? A. Duly Funeral Home.

Q. Were you so employed on September 22nd, 1954? A. I was.

Q. And I will ask you if you were at the Penitentiary in Jefferson City, on the night of September 24? A. I was.

Q. And what did you go there for? A. To remove the bodies of the inmates that died.

Q. How many bodies did you remove? A. Three.

Q. Did you remove the body of Walter Lee Donnell? A. I did.

MR. HENNELLY: Object to that as calling for a conclusion and must necessarily be based on hearsay, and no proper foundation at this point has been laid for such a question.

THE COURT: Sustained at this time. The witness wouldn't have any personal knowledge, it would be hearsay.

Q. I show you Exhibit No. 8, what has been marked as Exhibit No. 8, and will ask you if you can tell this Jury whether you have ever seen that man before? A. I have.

Q. And when? A. On the night of September 22nd.

[154] Q. Where? A. In the Administration Building in the Missouri State Prison.

Q. What condition was he in? A. He was dead when I saw him.

Q. And just describe the condition as you saw it? A. Well, when he was laying there, he was pretty bloody, and they had him laying on his back on the floor.

Q. And what was his condition, what was the condition of his head? A. On his right side, his head was caved in.

Q. What else did you observe? A. An on below his ear lobe, here, the lower piece was torn loose.

Q. What about his throat? A. Well, he had two gashes, one on each side of his throat, one on one side and one on the other.

Q. You say that the body you examined was the body of the man pictured in Exhibit No. 8? A. It was.

Q. And what was his name, did you know him as Walter Lee—

MR. HENNELLY: Object again, that would be a conclusion that would necessarily be based on hearsay.

THE COURT: Sustained.

Q. What did you do with that body? [155] A. We taken him to the funeral home and undressed him and then embalmed him.

Q. What did you observe about his body before you embalmed him? A. Well, he had lacerations all over his body and on his left side, there was five wounds on his left side, above his heart, and then he had four or five in the back, and in the back they looked like they could have been stab wounds.

MR. HENNELLY: Object to that section.

THE COURT: Sustained, being a conclusion.

Q. Don't tell what they could have been, just describe them. What was the size of them and the shape? A. In the back they were larger than in the front.

Q. What part of the back were they? A. In the back.

Q. Were they on the left side? A. On the left side, around the rib section.

Q. Around the rib section? A. Yes, sir.

Q. Now, what part of the body on the front was the wounds? A. Right here above the heart, in this area.

Q. Now, I direct your attention to the area in the back and where were those wounds? A. Well, approximately, I would say they were pretty well in the same area in the back.

[156] Q. Were they— A. Below the shoulder blade there.

Q. Now, the wounds in the front, what size were they? A. They were smaller wounds than the ones in the back, and in the back they were long wounds.

Q. What shape were the ones in the front? A. Well, they were more round.

Q. And what were they in the back? A. They were long.

Q. How long? A. Oh, I would say half an inch, maybe three-quarters of an inch.

Q. And how wide were they? A. Well, they weren't too wide, they were together, they gapped open.

Q. How long have you been an embalmer? A. I have been an embalmer about three years.

Q. Have you embalmed bodies—strike that. You have had an opportunity to examine wounds made by knives and other sharp instruments? A. I have.

Q. And can you tell this Jury, in your experience, what, in your opinion, made the wounds in the back of of this body?

MR. HENNELLY: Excuse me, I want to object if your Honor please, I don't think based upon the evidence thus far, that this witness is qualified to permit him to testify under those [157] circumstances so far as to what caused those wounds. It would be a conclusion on his part and would be an invasion of the province of the Jury.

THE COURT: Overruled.

Q. Go ahead Mr. Eynard.

THE COURT: What kind of wounds were the wounds on the back?

A. I would say, according to my experience, they would be, would have been made with a knife.

MR. HENNELLY: Same objection, and ask that the answer be stricken and the Jury instructed to disregard it, and a mistrial declared.

THE COURT: Overruled, and the request is denied.

Q. Do you have any opinion as to the wounds in the front? A. Well, they could have been made by any round instrument.

THE COURT: He asked you if you had any opinion, you can answer that yes or no.

Q. If you do have an opinion or if you don't? A. Yes.

Q. What, in your opinion—

MR. HENNELLY: I am sorry, I didn't get a chance to object, the same objection for the same reason, no proper groundwork laid for such a question.

THE COURT: Overruled. All right, you may answer.

A. I would say some kind of a round instrument.

Q. You embalmed the body there? [158] A. Yes, sir.

Q. On what date? A. September 23rd.

Q. What happened to the body then? A. We shipped it to Nashville, Tennessee.

Q. Did you observe the rest of his body, what was the condition of the rest of his body? A. I couldn't say.

Q. Well, I mean did you see any other marks or wounds on the rest of his body? A. No, I didn't.

Q. Any on his legs? A. There were several—

MR. HENNELLY: Object, if your Honor, please, this is an attempt to rehabilitate and cross-examine his own witness in view of the prior questions and answers.

THE COURT: Well, counsel may direct his own witness as to parts of the body if he desires to. The objection will be overruled. However, I don't think the questions should become leading. I think you have a right to direct him to either refresh his memory or call his attention to any particular part of the body. He is testifying evidently from memory.

MR. HENNELLY: Same objection.

THE COURT: Overruled, and he may proceed.

Q. Go ahead, if you remember. [159] A. There several wounds on his legs.

Q. You remember what kind? A. I don't remember distinctly. They were wounds about the size of a quarter I would say.

Q. I believe that is all.

Cross-Examination by Mr. Hennelly

Q. Mr. Eynard, how old a gentleman are you sir? A. Twenty-four.

Q. And you began embalming then when you were twenty-one, is that right? A. Twenty-one.

Q. And do you do some work for the State of Missouri, up there in Jefferson City? A. I haven't, other than this.

Q. Sir? A. I haven't, other than this.

Q. You haven't other than this one? A. No.

Q. Can you tell this Court and Jury approximately how many bodies you have embalmed in the three years you have been doing it? A. That is hard to say. I could get at it about, maybe two hundred or two hundred and fifty.

Q. Two hundred or two hundred and fifty? A. Yes, sir.

[160] Q. And of those two hundred or two hundred and fifty, how many of them have died from stab wounds? A. About three or four.

Q. Three or four? A. Yes, sir.

Q. And so that your statement with respect to how this man died, is based upon your having seen three bodies in which people have been stabbed?

THE COURT: He didn't testify how the man died. He didn't testify what killed the man.

Q. I will rephrase the question Your Honor.

THE COURT: He testified that in his opinion, the wounds on the back were knife wounds, and the wounds on the front were round wounds by some round instrument.

Q. Very well. Then your opinion with respect to the wounds in the back, that is based upon your examination of three people who have been stabbed, is that right? A. I would say three or four.

Q. Three or four? A. Yes, sir.

Q. And that is true of the ones in the front, is that right? A. Yes, sir.

Q. Then you think under those circumstances, that you might be mistaken about it sir? A. Not hardly.

Q. You couldn't be? A. I don't believe.

Q. Have you examined any records of the Prosecuting Attorney, [161] or of the State Highway Patrol, before you came down here sir? A. No, sir, I have not.

Q. Have you seen any of their records in the last three or four months? A. No, sir.

Q. And so that everything that you are testifying to here today is from your memory, with respect to what you saw on September 23, 1954, is that right? A. Yes, sir.

Q. Do you know about how much that man weighed that you embalmed? A. I would say between one hundred and thirty and one hundred and forty pounds.

Q. And if I understand you correctly, you saw some marks on his legs which were about the size of a quarter, you saw some marks in the front and some in the area of the heart, and some marks in the back, in back of the heart area, is that correct? A. Yes, sir.

Q. And then you saw something, a mashed in place on his head, is that right? A. His right side of his temple was crushed.

Q. The right side? A. Yes, sir.

[162] Q. Are you sure it wasn't the left side, but the right side? A. No.

Q. And did you see any other marks on him? A. He had quite a few marks on him, but I don't remember right off.

Q. I see. I have no further questions Your Honor.

MR. RILEY: That is all. Call Dr. Schull.

DR. G. D. SHULL,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. State your name please. A. Dr. G. D. Shull.

Q. How old are you Dr. Shull? A. Thirty-nine.

Q. Where do you live? A. Jefferson City, Missouri.

Q. And after you graduated from high school, where did you go to school? A. Two years at Jefferson City Junior College and a year later at the State University, three years at the University of Missouri, and two years Northwestern University.

Q. And where did you receive your medical education? A. Northwestern University, and University of Missouri.

Q. And when did you graduate sir? A. 1942.

Q. Where did you intern? A. City Hospital in [163] St. Louis.

Q. How long? A. Nine months there and three months at the Navy Hospital in San Diego.

Q. How long were you in the Navy sir? A. Forty-four months.

Q. And were you in the Navy as a medical doctor, commissioned as such? A. Yes, sir.

Q. During the time you were in the Navy, did you have an opportunity to observe and treat various types of wounds? A. Yes, sir.

Q. Did you have an opportunity to observe and treat gunshot wounds? A. Yes, sir.

Q. And cuts? A. Yes, sir.

Q. At various times? A. Yes, sir.

Q. Doctor, I will ask you if, on September 25, 1954, you went to Nashville, Tennessee? A. I did.

Q. Who did you go with? A. Mr. Lamar and the pilot of the Highway Patrol plane and Mr. Jones.

Q. Dr. Shull, you are practicing medicine in Jefferson City [164] now? A. Yes, sir.

Q. In addition to that, do you have any connection with the Missouri State Penitentiary? A. I am sir, I am in the Algoa branch, the Intermediate Reformatory, and the Women's Branch.

Q. Now, did you observe a body in Nashville, Tennessee? A. Yes, sir.

Q. And how many bodies did you observe? A. Just the one.

Q. And was Mr. Lamar there? A. Yes, sir.

Q. Did he identify that body to you?

MR. HENNELLY: Object to that for the same reasons heretofore stated Your Honor.

THE COURT: Well, he may answer that question yes or no, the objection is overruled.

A. Yes.

Q. And whose body was it?

MR. HENNELLY: Object to it, if Your Honor please, for the reasons heretofore stated, and for the reason that it is hearsay and a conclusion and no proper foundation laid for such a question.

THE COURT: The objection will be sustained as to the form in which the question was asked. I will permit this witness [165] to testify who Mr. Lamar identified the body as.

Q. Who did Mr. Lamar identify the body as?

MR. HENNELLY: Same objection.

THE COURT: Overruled.

A. That of Walter Lee Donnell.

Q. Did you make an examination of that body? A. I did.

Q. And what type of an examination did you make? A. Post mortem or autopsy examination for the purpose of determining the cause of death.

Q. Now, will you tell this Jury just what you found? A. Because of the multiplicity of wounds, may I be permitted to use my notes?

Q. You may use your notes to refresh your memory and then testify from your memory. Now just a moment, these notes that you have there in your hand, are those the notes that you made? A. Yes, sir.

Q. When did you make them? A. I made them at the time in longhand and then had my secretary transfer them over to typewritten form on my return.

Q. Are the typewritten notes the same as your longhand notes? A. Yes, sir.

Q. All right, go ahead.

[166] MR. HENNELLY: Just for the purpose of the record, if Your Honor please, I would like to object for the reason that the Doctor is obviously reading them and I think for the purpose of refreshing his memory, he may examine them and testify independently of the notes. If he reads them, I say that is hearsay.

THE COURT: Well, I don't know, he just asked the question if he may use his notes, or his report or whatever he has to refresh his memory, and the Court will permit him to do that, but his testimony should be his memory and recollection of the testimony, and he may use this to refresh his memory and where he is referring to matters of measurement and things of that kind, why certainly he has a right to read off those figures. That would be part

of his refreshed memory. It may be a little difficult for you to do that Doctor, but you should testify from your recollection and you should use your notes only to refresh your recollection.

Q. All right Doctor, from your memory, did you examine the head of this man who Mr. Lamar identified to you as Walter Lee Donnell? A. I did.

Q. What condition did you find there? A. There was a severe mashed in, or compressed area in the right side of the face approximately just underneath the right eye, that extended back, involving the right ear with [167] separation of the lower part of the ear, lower part of the ear was torn away from the body about a third of its normal attachment area. There were two cuts about the neck, over the great vessels of the neck, one on each side. There was a little, or smaller cut on the left cheek. Those were the outstanding findings of the head and neck.

Q. Now, did you make any examination of the interior of the head, the brain structure? A. Yes, sir.

Q. Tell the Jury how you did that? A. Well, after the surface marks were all identified and recorded, then the scalp was cut across and the top part of the skull was removed and the brain was pulled back to show the floor of the skull or the brain case, the right front part of the lower part of the skull, or the floor of the skull brain lining, and there was multiple fractures in this area which were described as an egg shell type fracture, because of the multiplicity of fractures. It was not a single line, it was just a multiple crushing type of fracture, in which there were many small fragments. There was a fracture on the opposite side of the skull in the back that was more of a linear nature that started in about the middle part of the skull and extended to the left and backward to the back part of the skull on that side. The brain itself over the area overlying the area of this compression fracture, had received [168] about—

MR. HENNELLY: I can't hear you Doctor.

A. I think those were the major findings inside of the skull.

Q. Was the brain itself damaged? A. Yes, I just stated that it had this red discoloration or hemmorhage in the part that was overlying the fracture area in the front part of the skull.

Q. Now Doctor, from your experience and knowledge, as a medical doctor, can you tell this Jury whether or not the condition you found there, the crushing of the skull would be a mortal wound? A. Yes, I believe it would.

Q. Now, did you make any examination of his chest area? A. Yes, sir.

Q. What did you find? A. The examination was first done on the outside of the surface of the body, and there were five stab wounds on the left side of the chest in front overlying the heart, and lung area, there were several smaller breaks in the skin or puncture wounds, or lacerations or stab wounds, however you wish to describe them in the upper left shoulder and armpit region. There were, I believe four stab wounds or lacerations in the back on the left side, and feeling the skin over this area revealed evidence of air underneath the skin which had escaped from the chest cavity into the skin [169] or tissue below the skin, and about the area of these wounds in the back.

Q. Now, did you make any examination as to the depth of the wounds from the front of the chest? A. The chest cavity was opened then.

Q. What do you mean by the chest cavity was opened? A. Both—by removing the front part of the breast bone and the front part of the ribs on each side in a diamond shaped fashion across the breast bone was removed and each lung cavity examined. That is, I ex-

amined both the right and left side of the lung cavities and the heart area that is overlying that, the left lung was found to be collapsed and there was evidence of injury to the sack overlying the heart. There were two wounds in the sack that surrounded the heart and a probe was placed in the wounds from the outer part, where we found the wounds on the outside, and these corresponded with the chest cavities, these wounds corresponded to the wounds found in the heart, so we determined that two of the wounds of the five stab wounds that we found in front, had entered the heart cavity.

Q. Had they entered the heart itself? A. Yes, the heart sack was then opened, and the heart itself was opened, and the probe was replaced and it was found that the wounds of the heart, the two wounds in the heart went through both the front and back walls of the heart, had gone [170] completely through the heart from the back. Then by lifting the heart from its sack, if my memory serves me correctly, two of the wounds from the back had apparently gone through the sack surrounding the heart and had penetrated the heart from the rear, but had not gone through the heart. They had gone into the heart, but not through it.

Q. Now, what do you mean by probing Doctor? A. Well, we used a rather long metal wire like instrument that has a blunt end on it, and it is inserted in the opening and from the outer opening and it is used to determine the course and direction of wounds to see where they go, I mean which direction they go, or whether they correspond to wounds from the outside.

Q. Now Doctor, from your experience and knowledge as a medical doctor and in examination of this body, can you tell this Jury whether or not the wounds which entered Donnell's body from the front would be considered a mortal wound? A. Most certainly.

Q. Now, what about the wounds that entered in the heart area from the rear, would they be considered a mortal wound? A. In all probability. I mean they may survive it, but if the heart muscle itself is cut, there is likelihood of death.

Q. Doctor, did you probe all of the wounds there around the heart and lung area? A. Yes, sir.

[171] Q. Did you find any of those wounds that went completely through the body? A. No, sir.

Q. Doctor, from your examination, can you tell this jury what type of instrument would have caused the wounds in the front over the heart area? A. Well, I am unable to determine the type of instrument other than to say it was apparently a small diameter or width blade. Just as a rough example, it may have been the width of the ordinary pocket knife blade. I mean from the cutting edge to the back edge, as far as width is concerned, as far as the other diameter is concerned, it was roughly about the same appearance and did not appear to be necessarily, I mean as far as describing the type of instrument, I am unable to say that it was a perforating instrument such as a long knife blade may be.

Q. How long an instrument would have been required to inflict the wounds from the front? A. Roughly I would say the effective length was—probably be, the instrument must be at least four inches, between four and five inches.

Q. Now, how long would you say the instrument was that inflicted the wounds from the rear? A. Roughly the same, it was about the same. The heart is situated more or less in the central part of the body from the [172] front to the back, and however the wounds from the back, did not penetrate to the depth or at least as far as the heart was concerned, as they did in the front.

Q. Now, how large an instrument would have been, would you say was used to inflict the wounds from the back? A. Well, the opening on the skin in the back was approximately I would say, roughly half an inch in its longest diameter, and appeared more or less as slits as far as the skin was concerned, and maybe there was an eighth of an inch separation there and approximately half an inch in slit like length.

Q. Doctor, did you make any examination to see whether or not there were any gunshot wounds on this body? A. Yes, sir, from the standpoint of retained metal fragments, are probably the best methods of determining gunshot wounds. Usually when any type of gunshot wounds, unless it is some steel jacket bullet, there will be missiles scattered, bits of metal scattered, and because of that, X-rays were taken of the body, taken of the skull region and of the chest where most of the injuries appeared to have occurred, and we determined from that, that there was no evidence of any metal fragments there. There was no appearance of a wound on the outer surface of the skin that would suggest that of the usual gunshot wound.

Q. Did you examine it in particular to determine whether there were any gunshot wounds? [173] A. Yes, sir, that was the purpose of the examination.

Q. Did you find any injuries on his limbs? A. Yes, sir, as I recall, the right index finger, the tip of the right index finger had been torn away. There was some bruises scattered over the back of the hand, back of both hands, and bruises on the back of the right forearm, and there was bruises of the right shin area, on the front part of the right leg, that were in a linear fashion, started just above the ankle and there were more bruises, as I recall, on the right shin up toward the knee.

Q. Doctor, I will show you what has been marked as State's Exhibit No. 9, can you see that there? A. Yes, sir.

Q. And I will ask you if that instrument could have caused the injury to Donnell's skull, if in your opinion it could have caused it?

MR. HENNELLY: I am going to object, if Your Honor please, for the reason it is too vague, indefinite and speculative and for the further reason that it assumes something that is not in evidence.

THE COURT: What isn't in evidence?

MR. HENNELLY: The fact that he was hit on the head with it Your Honor.

THE COURT: Well, overruled. You may answer.

Q. Go ahead. [174] A. The question was—

Q. If that instrument—

THE COURT: If the injury you found upon the right side of the head of this body that you examined, could have been caused by the instrument such as Exhibit 9?

A. Yes, sir.

Q. Now, which part, for the record, that instrument has two ends to it, which end would have caused the injury to Donnell's skull? A. From the appearance of the injury it would be a blunt end, such as the end facing me.

Q. Would you point it out to the Jury? A. This would be a larger, a flat surface area.

Q. At this time Your Honor, we offer State's Exhibit No. 9 into evidence.

MR. HENNELLY: I will object for the reason that the proper foundation has not been laid for its introduction, and for the reason that it is hearsay, and to introduce it under these circumstances would be in violation of the constitutional rights of the Defendant.

THE COURT: The objection is overruled.

MR. HENNELLY: Very well.

THE COURT: It may be received in evidence.

Exhibit 9, being the sledge hammer, and same being too large to attach to the transcript of the record, a photograph [175] of same is attached to the original of this transcript.

MR. RILEY: I believe that is all at this time.

Cross-Examination by Mr. Hennelly

Q. Doctor, if I understand it, this body that you examined at Nashville, you especially looked for gunshot wounds, is that right? A. Yes, sir.

Q. And if I understand correctly, based upon your experience, that this body that you examined down in Nashville, there weren't any gunshot wounds in it? A. I feel safe in saying that there were no gunshot wounds.

Q. Now, prior to the time that you went down there, were you given any of the death certificates or anything to study before you went down there? A. No, sir.

Q. Did you after you returned, did you incorporate your findings into some type of a report? A. I did. I had the autopsy findings, as I have in these notes, which I carried here with me, typed up into three copies, and a copy was sent to the Director who requested me to go down and perform the autopsy, and a copy to Mr. Riley, and a copy was placed in my own file.

Q. The one copy you say went to Mr. Riley and when you say the Director, you mean the Director of the prison, sir? [176] A. Director of the Department of Correction at that time.

Q. Who was that, at that time? A. Mr. Thomas Whitecotton.

Q. He is no longer in that position, is he? A. He is not.

Q. Very well. Now, I am going to ask you, up until that time, how many autopsies or post mortems had you performed Doctor? A. During my training period, while

still in school it was required to do twenty-five, and then scattered since that time, approximately another twenty-five or thirty.

Q. I see. Do you make any autopsies for the Cole County, or for the State of Missouri, or are they part of your duties sir? A. Not except as in line as a physician, in which there is some question as to the cause of death, and at which time I have performed autopsies to determine the cause of death.

Q. Now then Doctor, I am going to ask you, are you familiar with rigor mortis? A. Yes, sir.

Q. Doctor, how long does it take for rigor mortis to set in a body? A. Well, there is a good deal of variation in that, it depends entirely upon the time, the temperature factors have a great deal to do with it. It isn't I would think it would be difficult [177] to state a flat rule, and say rigor mortis occurred at such and such a time, in hours and minutes, but as an average, or as a rough guess, we would say approximately two to three hours.

Q. Have you ever seen a body wherein rigor mortis set in in less than three hours, you personally? A. I personally?

Q. Yes. A. I don't recall.

Q. Within your experience, what is the quickest time that you have seen rigor mortis set into any body? A. Well, to define rigor mortis, just a bit further here, maybe rigor mortis is a stiffening of the muscles here which may be primary. It may even occur before death in people that are frozen.

Q. You say you may have it, it may appear before death actually occurs? A. At least the extremities and muscles and blood congeals in the muscles, and they no longer respond, and the muscles are stiff, and therefore you could have a stiffening, you could have rigor mortis

probably before, I mean by the term of rigor mortis, the rigidity of the muscles.

Q. Doctor, is it your testimony that there are times when rigor mortis sets up prior to death? A. We say rigor mortis as defined by stiffened muscles, in which the muscles are unable to move, if the body is frozen or [178] stiff, and the body is frozen by outside temperature, I mean frozen in the sense of being exposed to very low temperature over a long period.

Q. Well, let's take a dead body, how long does it take a dead body, for rigor mortis to set in under just normal conditions? A. Well, actually I don't know whether I am qualified to answer that.

Q. Have you in your experience, ever known of a dead body where rigor mortis has set in, at anytime less than three hours? A. From my personal knowledge?

Q. Yes. A. Yes, I think so.

Q. When was that Doctor? A. Well, I recall during intern training at the City Hospital in St. Louis, part of my service was at the Infirmary in St. Louis, and we spent sometime there, and there was quite a number of old people, and many of them were bedfast for long periods before death, and I recall one old lady that I was called to see, we were on the premises at all times, we lived there, and the nurses recorded her not breathing around eleven-thirty in the morning, and I was called to pronounce her dead, and it was after the lunch hour, which was probably twelve-thirty or twelve forty-five, and rigor mortis was present there.

[179] Q. Well Doctor, let's take a body, take into consideration a body that you saw down in Tennessee, taking into consideration the age and the height and the weight of that body, how long would you say it would, in the normal course of events, take that body for rigor mortis to set in? A. Well, I don't know whether I can

answer that satisfactorily at all, but I think it would definitely have something to do with the amount of blood present, if a body was more or less without a quantity of blood, it might take considerably longer for rigor mortis to set in, than it would if the body had had its normal full blood supply.

Q. Let us assume that the body had four stab wounds in the front and five in the back, and they were through and through the heart, and taking that into consideration Doctor, and taking further the fact that there were cuts along both sides of the neck, and that they had caused considerable bleeding, would you say that it would take longer for that body, for rigor mortis to set into that body? A. Yes, I would say yes.

Q. And I will ask you, if normally, within your post mortem work, and in autopsy work, whether pathologists and doctors who concern themselves exclusively with that type of work, would average rigor mortis to set in at approximately four hours, if you know that? A. I don't know.

[180] Q. All right. Now then Doctor, this body that you examined had already been embalmed, is that correct? A. Yes, sir.

Q. Now, I am going to ask you Doctor, with respect to the wounds that you found on both sides of the neck, you did find them on both sides of the neck? A. Yes, sir.

Q. Doctor, did any of those sever the jugular vein, or any of the veins which went up the side of the neck? A. We re-opened that area to look, and apparently there was no damage to the large vessels.

Q. So that those wounds on the neck, on both sides of the neck, were not in your opinion, fatal wounds, is that right? A. Not immediately fatal, no.

Q. Now Doctor, did this man suffer from any hemmorhage of the skull, any subdural hemmorhage? A.

Subdural hemmorhage, you mean hemmorhage which is outside the membrane that is just inside of the skull?

Q. Yes. A. There was no evidence between the bony part and the membrane, that is, in direct contact with the bone of the skull.

Q. How big a man, how tall a man would you say this body was that you examined? If you recall? You may refresh your memory. A. It was estimated at that time, his height was estimated at [181] five feet and ten inches.

Q. And his weight? A. Approximately one hundred and sixty-five pounds.

Q. One hundred and sixty-five pounds? A. Yes.

Q. The man that you examined then was at least thirty or thirty-five pounds more than one hundred and thirty pounds, and there was no gunshot wounds in it? A. The question again?

Q. The body that you examined was a body that in your opinion weighed approximately one hundred and sixty or a hundred and sixty-five pounds, and there was no evidence of a gunshot wound in it? A. That is correct.

Q. Just one more question Your Honor. Can you tell the Court and Jury how long after you returned to your office at Jefferson City, did you send those reports to the two people that you indicated you sent them to Doctor? A. No, sir, I can't tell you exactly, because it was placed in the—we have a one girl office, and she takes care of a number of insurance forms, and a few other things, and we try to practice law along with it, and we put the rough notes, and I couldn't tell you exactly, but I think probably within that week, and I am guessing that it would be the latter part of the week, before—

[182] Q. Mr. Riley was with you though when you were down there examining the body though, anyway? A. In Nashville?

Q. Yes. A. Yes, sir.

Q. I have no further questions. Thank you very much Doctor.

Redirect Examination by Mr. Riley

Q. Doctor, how long after a body is dead, would it start to show signs of stiffening? A. Show signs?

Q. Of stiffening?

MR. HENNELLY: I think that is rather vague, and indefinite.

THE COURT: Are you making an objection?

MR. HENNELLY: Yes, to the use of the word "stiffening".

THE COURT: Overruled.

A. As I stated before, I think it varies a good deal.

Q. Well, what I am getting at Doctor, how long a period of time, if you can say on the average, would a body, from the time that a body begins to stiffen, how long would it take until rigor mortis is completed? A. Well, to further—the actual beginning of the stiffening is the beginning of rigor mortis, that is rigor mortis.

Q. Does it get stiff all at one time? A. No, sir, I don't think so.

THE COURT: That is what he is asking you Doctor.

[183] A. No, it goes by degrees.

Q. Gradual? A. Yes, sir.

Q. That is all.

MR. HENNELLY: No more, thank you.

THE COURT: Now gentlemen of the Jury, we are going to recess for the supper hour. The Sheriff has made arrangements for your evening meal. I might further say to you that in a case of this kind, that it is necessary that the Jury be kept together from the beginning of the case and during the recesses of the Court, and for the supper hour and later for the night recess of the Court, it is neces-

sary that the Jury stay together and not become separated from each other. As you are walking down the street or going back and forth, either to the hotel or to the restaurant, don't straggle out or become separated from each other. Don't allow any person to speak to you about this case or don't you speak to anyone about it and you shouldn't discuss the case among yourselves, during the recesses of the Court. In other words, when you are around the table eating tonight, don't talk about the case. The discussion of the case by the Jury is supposed to take place only in the Jury Room, and then only after all the testimony has been heard, after the argument of counsel, and the instructions of the Court. You shouldn't allow anything to come into your hands that informs you concerning this case in any way. The reading of newspapers or listening to [184] radios, news reports or accounts or anything of that kind shouldn't happen. The Jury is not to be informed in any way of any matters concerning this case, other than from the testimony that you hear from the witness stand, and the testimony that is received in evidence, under the direction of the Court. The Jury is to be guided only and solely by the testimony and during the trial of the case, and not by anything that you may hear or obtain from the outside. If you have any needs that have to be met during the evening, or as you are going down to the restaurant, or anything of that kind, you can convey that information to the Sheriff. He will be with you during the recesses of this Court, and he has made arrangements for your meals and also arrangements for your housing. It would be impossible under our circumstances to house all of the Jury in one room. We don't have any one room large enough. We don't have facilities in the Court House for housing the Jury, but an area or section of the hotel has been obtained, and the Sheriff will be out in the hall so that no one can get to or from that

room without passing him, but you will be in separate rooms in the hotel and there will be more than one of you in a room. In other words, you will be in a section of the hotel to yourselves, and that is the only way we can do it under the arrangements and facilities that we have. Even our hotel facilities could not provide for a room sufficiently large enough [185] to house all of the Jury in one room, space area, but the main thing that I want to call to your attention is not to allow anyone to talk to you about this case, not to talk to anyone about it, not to discuss it among yourselves, not to read any accounts or listen to any accounts concerning this case at anytime, and not to allow anything to happen that would inform you in any way about the case from an outside source, other than from the testimony that you hear from the witness stand. Now Gentlemen of the Jury, this is very important, and I only want to do this one time, but I want to impress upon you the importance of it. You are members of this Jury panel and for this particular purpose you are officers of this Court in the trial of this case. In the trial of a lawsuit such as this, it is very important to all parties concerned, that you should stay together and not become separated. It is absolutely necessary that you conduct yourselves in such a way that none of your actions, or no statements or anything done by you or said by you can in any way reflect upon whatever verdict you shall reach in this case. So I want to impress upon you the seriousness of the requirements that you remain together, the requirement that you don't allow anyone to speak to you or talk to you about the case, the requirement that you don't discuss it among yourselves, and the fact that I believe I already said to you that you shouldn't become separated from each other, and [186] shouldn't try to receive or look at or read or listen to any outside reports of the case. Now, we will

recess, it is about 5:15. Will it be necessary for you to get the rooms lined out during the supper recess?

THE SHERIFF: It would probably be a good idea.

THE COURT: If any of you want to send any word to members of your family, why you may tell the Sheriff and inform him of that, and he and his deputies will call or see that members of your family are called, and if any of you want any toilet articles, like a razor or tooth brush or anything, well you can call members of your family and want them sent to you, they should bring those to the Sheriff's office so that no one can come up and hand you anything. They can hand it to the Sheriff and he can inspect it and see that you get it, if it is directed to you. I don't know of any reason why we can't be back here at 6:45. We will reconvene at 6:45. Inasmuch as the Jury has to be held together, we will work some this evening and take some additional testimony this evening before it is time to retire.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 426) Monday, July 18th, 1955, Regular July 1955 Term

At this time, at the evening recess, the Sheriff of [187] Butler County is sworn to take charge of the jury for all recesses of the Court and the jury is cautioned as to their conduct and behavior during recesses of Court and supper recess is declared.

And at this time, the supper recess being over, trial in this cause is resumed in the hearing of the evidence.

MR. RILEY: Call Clarence Dietzel.

CLARENCE DIETZEL,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. Will you state your name please? A. Clarence Dietzel.

Q. And where do you live Mr. Dietzel? A. California, Missouri.

Q. And how far is that from Jefferson City? A. Twenty-six miles.

Q. How old are you Mr. Dietzel? A. Fifty-five years.

Q. Are you a guard at the Missouri State Penitentiary? A. Yes, sir, I am.

Q. How long have you been a guard at the Penitentiary? A. A total of near onto eight years, close to eight years.

Q. Were you a guard at the Missouri State Penitentiary on the night of September 22nd, 1954? [188] A. I was.

Q. What part of the Penitentiary were you working in that night? A. I was assigned to duty to B basement.

Q. B basement, also includes Death Row? A. Yes.

Q. I will ask you if you are acquainted with the Defendant, James William Stidham? A. Yes, sir, I am.

Q. Do you know him by any other name? A. Well, his nickname is "Slick".

Q. How many inmates were in Death Row on the night of September 22nd, 1954? A. If I remember correctly, there was nine.

Q. And do the inmates have a nickname for you? A. Yes.

Q. What is that? A. They call me "Shaky". I have a tick that I have had since childhood.

Q. What did you say sir? A. They call me "Shaky". I have a tick that I have had since childhood. I have had

it ever since, a tick, that is what they call it, since I was a child, real small.

Q. You mean you shake your head sometimes? A. Yes, sir.

Q. And you don't have no control of it, is that right? [189] A. That is right.

Q. Now, did you notice any disturbance in the Penitentiary on the night of September 22nd, 1954? A. Yes, sir, I did.

Q. After you noticed a disturbance, did you have any conversation with Stidham? A. Yes.

Q. What was the first conversation that you had with Stidham? A. After they had broken into B basement door, and came into the B basement proper, I had the doors all locked securely, and that left them the bars and the gate between B basement and Death Row, of which was a partition between Death Row and B basement. They couldn't get into B basement for the inside doors. DeLapp—

Q. Now, just a minute. A. What was the question?

Q. I asked you if you had any conversation with Stidham, you yourself? A. I am sorry, I misunderstood you. Stidham?

Q. Yes. A. Yes, some of the boys wanted—

MR. HENNELLY: I am going to object, if Your Honor please, for the reason this is too vague and speculative and would be hearsay, insofar as it doesn't identify who wanted something.

THE COURT: It isn't responsive to the question.

Q. What did you do with respect to the windows in B basement? [190] A. I was closing the windows, to Death Row, and Stidham demanded in foul language "Goddamn it, leave those windows up." That was his window. And Laster, next to him, also demanded that his window be left up. The other windows were all closed.

Q. Mr. Dietzel, I will show you what has been marked State's Exhibit No. 5, do you recognize that sir? A. That is Death Row.

Q. Now, what windows are you talking about, are they shown on that exhibit? A. Those windows on the south side, facing these Death Row cells. They were back, you can't see them here, but they were back further.

Q. Now, where did those windows open onto? A. They were just the old type.

Q. No, I mean, when you look out of that window, what do you see? A. Over to F and G Hall.

Q. Is it out on the yard? A. Out on the yard between the two cell buildings.

Q. Now, do you know Don William DeLapp? A. That is right.

Q. Do you know him by any other name? A. His name was Curley.

Q. Now— A. Nicknamed "Curley".

[191] Q. Now, do you know Edward Paul Kenton? A. Yes.

Q. You know Jackie Lee Noble? A. Yes, sir.

Q. William R. Hoover? A. I do.

Q. Joseph M. Vidauri? A. Yes.

Q. You know Vidauri by any other name than that? A. "Jap Joe", his nickname.

Q. Did you see Williarm R. Hoover there? A. Yes.

Q. And when was the first time that you saw Hoover? A. That is when they were in B basement proper.

Q. When did you see DeLapp there? A. Yes.

Q. When was the first time you saw DeLapp? A. After they got B basement door, and entered into B basement proper.

Q. Did you see Kenton there? A. He was just a few steps in front of DeLapp.

Q. What about Noble? A. Noble was in the body of men, wasn't directly up next to the partition at that time. He was there. I had seen him in that body of men, but he wasn't up just directly close to the partition.

Q. Did you see Vidauri there? [192] A. Yes, I did.

Q. Where was he? A. He was back in the crowd about, oh, about from here to the man on the back end of the Jury there, just about that distance between me and him when I seen him.

Q. Did you hear any conversation between the Defendant Stidham and any of these other six that I have just named? A. Yes, a conversation between DeLapp, DeLapp said, called down from B basement door, and said, "Slick, oh, Slick".

Q. Now, who was doing this? A. That was DeLapp. He said, "Can you hear me?" and Stidham answered back and said "Yes", and he said "We are coming down to get you, we are going to get you out." Stidham answered back and said, "Hurry up, Goddamn it, I am waiting for you." And they continued on trying to get the gate open.

Q. How do you mean they tried to get the gate open? A. With a hammer, sledge hammer beating and malling, prying with something similar to a crowbar. I couldn't say how sharp it was. It was an iron bar.

Q. Who was doing this? A. DeLapp. That was out at B basement door. And several of the other boys, I don't remember their names, I can't tell, couldn't make a statement on that, the individual group, but DeLapp was one of them. So after a bit, DeLapp called back and said, "Slick, can you hear me?" and that was after a long [193] time of work, and Slick said, "Yes," and DeLapp said, "Goddamn it Slick, he said, we fucked up, we can't get to you." He said, "We just can't make it this time, sorry." Slick said, "Well it is all right," he said, "I know you have done your best, it is all right, I know you have done your

best." And they said, "We are going to try something else", Curley said, DeLapp. So DeLapp immediately started beating and hammering on the wall, partition between Death Row and the Classification Room, and then they worked there quite a while, and then they give that up, and came back and called again, and said, "We are going to try again", and by that, immediately, a short period of time, they produced a key from somewhere and opened the door, and then came into the B basement proper and that is when DeLapp demanded the keys of me.

MR. HENNELLY: Object to any conversation between the witness and DeLapp for the reason that that would be hearsay and not done in the presence of the Defendant.

THE COURT: Where were you at the time?

A. When DeLapp was talking to me, I was in Death Row. He was demanding the keys from me, just through the bars. I was in Death Row and he was in B basement proper.

THE COURT: How long was this after the noise, or I believe maybe the disturbance or something as you have described it, had first started, how long after, about, approximately, the beginning of it?

[194] A. I have no sense of time that evening.

THE COURT: I understand.

A. It was some period of time.

THE COURT: Had there been a continuous action in and around and about there all during that time? A. Yes, continuous.

THE COURT: Is this Don William DeLapp that you are talking about?

A. Yes.

THE COURT: May I see counsel here just a minute, and Mr. Ehlers. (Out of the hearing of the Jury)

MR. RILEY: This conversation I am asking about occurred after the conversation that he has related between DeLapp and Stidham, as to breaking in to get him out. He can then tell what was said and what was done.

THE COURT: This is the same William DeLapp that was charged as a co-conspirator or co-defendant or something with this defendant?

MR. RILEY: Yes, sir, charged with the same crime, in other words.

THE COURT: Well, of course it is obvious that this is all preceding the—

MR. RILEY: Killing.

THE COURT: Death of Donnell.

MR. RILEY: Oh, yes.

[195] THE COURT: I don't know that it is, but I presume that is what your testimony would be.

MR. RILEY: Yes.

THE COURT: All right, the objection will be overruled, and this witness may testify as to the events during the general disturbance that he has testified to, and the commencement of it and also conversation as you recall here between DeLapp and the Defendant, with reference to getting him out of this cell.

MR. HENNELLY: May I ask one question Your Honor?

THE COURT: Yes.

MR. HENNELLY: Does Your Honor feel that that is either part of the res gestae or does your Honor feel that it is a statement which is a furtherance of the conspiracy?

MR. RILEY: We offer it as the last, furtherance of the conspiracy.

THE COURT: You what?.

MR. RILEY: We offer it for the purpose of showing conspiracy.

MR. HENNELLY: If that be so Your Honor, I would say that while any statement of co-conspirator would be admissible against other co-conspirators, but I think that the corpus of such a charge is the proof of the conspiracy itself, and while I realize that that might be done even by circumstantial evidence, I don't think that in this instance, and at this point, that they have proved a conspiracy between these men.

[196] MR. RILEY: As far as DeLapp and Stidham are concerned, we have.

THE COURT: Perhaps. I don't know whether it would be exactly a conspiracy. At least there has been evidence up to this point to show that they have talked to each other with reference to obtaining Stidham's release from the cell.

MR. HENNELLY: That is right.

THE COURT: And as far as that is concerned, as to which category it falls in, I don't know that the Court would have to state in his ruling on the objection, which category it falls in. It is my offhand opinion at this time that regardless of the matter of conspiracy, it would be part of the res gestae as to what occurred, and as to what the events were there, and what took place. This man has testified that he has lost conception of time. I don't know whether he has testified about what time these matters first started to occur.

MR. HENNELLY: He did not.

MR. RILEY: I don't think he did.

THE COURT: He might know that, and then we have the previous testimony of Lieutenant Barton, he started at ten, so probably somewhere in this period I presume, well there is already some testimony in the record as to a riot having taken place in the prison, and that was, I guess a continuing process during which period many things could have occurred, which were of a contributing nature and so

ask the witness about what [197] time, if he knows, when this disturbance that he has designated first started, and then the objection will be overruled and he may answer the question.

MR. RILEY: Mr. Dietzel, going back to the beginning of this, what time in the evening of September 22nd, did you first notice a disturbance occurring?

MR. HENNELLY: Your Honor, I think that the use of the word "disturbance" is really a conclusion, and is a very indefinite and vague term.

THE COURT: The word probably is. I think the witness himself used it earlier, in earlier testimony. I believe the first statement you made Mr. Dietzel, with reference to any unusual occurrence there, was the gathering of some inmates at the prison, around the door, is that correct, do I understand you correctly on that? What did you first notice that took place there that was unusual in the ordinary, or I should say in the unordinary course of events, while on duty as a guard? A. The first disturbance, first unusual thing was a period of time before this occasion.

MR. RILEY: What time was it?

A. What time was it?

Q. Yes. A. It was about six-thirty.

Q. In the morning or evening? A. In the evening.

Q. Of— A. September 22nd.

[198] THE COURT: Now, what time, you testified here about some man coming to a door, and then having a conversation between DeLapp and the Defendant Stidham, can you tell us about what time that was, or about how long after this six-thirty period that you have just mentioned? A. I could give it to you about.

THE COURT: All right, just approximately.

A. Seven or seven-thirty, after my first observation.

THE COURT: Now then, did some time, considerable time elapse between the time you have testified that DeLapp left that door and before he was back again at the door, as you have just testified here, was there some time, period of time elapsed in there?

A. A short period.

THE COURT: Now then, you may proceed Mr. Riley, and the objection you previously made Mr. Hennelly, will be noted.

MR. HENNELLY: Overruled is it?

THE COURT: Yes, overruled. The question was with reference to DeLapp asking or demanding the keys to the door.

MR. RILEY: All right. Go right ahead.

A. DeLapp stepped up, as I mentioned a while ago, up next to the partition, between Death Row and B basement, and DeLapp demanded the keys, "give us the keys, goddamn you, give us the keys, and if you don't give us the keys I am going to kill you, and Goddamn it, I want the keys right now." [199] I insisted that I didn't have the keys and he again demanded them and immediately Kenton, about five, four and a half or five feet in front of him, next to the bars, one standing here and one about there, and I was about this angle between them, where they could both talk to me, and they said "Goddamn you, give me those keys."

MR. HENNELLY: Object to this conversation, this being Kenton, for the reason Your Honor, that it is hearsay and not done in the presence of this Defendant, and not binding upon him, and to introduce it under these circumstances, there being no prior showing of any connection between Kenton and this Defendant, would be in violation of the Constitutional rights of the Defendant.

THE COURT: Does the Prosecution expect to tie up the testimony in this matter with reference to the witness Kenton?

MR. RILEY (Out of the hearing of the Jury) The testimony will show that after they got into the Death Row with Kenton, I mean Stidham was with Kenton in the commission of the crime.

THE COURT: The objection will be overruled. Now Gentlemen of the Jury, let me say at this point, the Defendant James William Stidham is the person who is on trial in this case, and sometimes all the testimony in a case can't come in at the same time. The Court will instruct you on matters of law relative to this case at the conclusion of the case, and you will recall the testimony and be guided only by such testimony [200] as may be pertinent in the case, and under the direction of the Court. Now, I am going on the statement of the Prosecuting Attorney, I am going to overrule the objection and admit the testimony at this time, at this point.

MR. HENNELLY: Very well.

THE COURT: If it becomes necessary at some other point, that some instruction as to this particular phase is necessary, the Court will make it at that time to the Jury. The Court does not wish to say, by this statement to the Jury, that he is wanting to emphasize, or wants you to make any particular note of any testimony. You are the judges of the whole testimony and will remember all of the testimony in the case. All right, you may proceed.

MR. RILEY: Now just a moment Mr. Dietzel, you started to make a statement what Kenton said. Now, at this time that he made this statement, where was DeLapp?

A. Immediately back of him to the rear, about five and a half or six feet, four and a half or five or six feet. Just one statement followed the other. Kenton followed DeLapp.

Q. How much time elapsed from the time that DeLapp made this statement until, regarding the keys, until Kenton made his statement? A. A matter of seconds.

Q. All right now, what did he say? A. "Goddamn you, give us those keys, you old cocksucking [201] sonofabitch. If you don't give us those keys, we are going to get you. You old sonofabitch, there won't be nothing left to put you together."

Q. Did you give him the keys? A. I did not. He again looked up at me at an angle like this, and said, "You motherfucking sonofabitch".

Q. Who did? A. Kenton.

THE COURT: (Out of the hearing of the Jury) Now, what was it Mr. Hennelly?

MR. HENNELLY: I think we should do something about those young kids in the Court Room, seriously.

THE COURT: No, I am not going to do anything about anybody in the Court Room. It is a public trial. Anytime any of them want to leave the Court Room, they may leave, but I am not going to order anybody out of the Court Room.

MR. HENNELLY: I don't want the Court to think I was saying that in an attempt to get any advantage or anything. I want to state that into the record. There are some little kids out there, seven or eight years old, and I know it is none of our faults.

Q. Mr. Dietzel, I direct your attention,—strike that. I direct your attention to State's Exhibit No. 1, and will you look at that? A. Yes.

Q. Now, can you point out B basement door, Death Row door, [202] point out B basement? A. Can I take it down?

THE COURT: There is a stick there, if you can point it with that. You are standing in front of the Jury now.

A. B basement?

Q. Yes. A. This is B basement.

Q. Now, is that the door that you say they first worked on? A. That is the first door, yes, sir.

Q. Now, where were you standing when this conversation was going on? A. Sitting here part of the time, and standing along here watching, as much as I could.

Q. Now, when this latter conversation about demanding the keys was going on, where were you? A. There is a gate, Death Row gate right here. Kenton was standing just back of the gate and DeLapp was standing about another third of the way back. I was standing in about the distance, average distance between them, about half way between the two men, standing about right in here, just three to four feet back so they couldn't punch me with a stick or knife.

MR. HENNELLY: Object to that last section.

THE COURT: Sustained.

MR. HENNELLY: Ask that that be stricken, not responsive.

THE COURT: That may be stricken. Don't volunteer any information, just answer the questions that you are asked. [203] A. I am sorry.

Q. I show you what has been marked State's Exhibit No. 9 and ask you if you saw that or instrument like that, there that evening? A. I sure did.

Q. Where? A. At Death Row door, one similar like that was used to beat the lock off.

Q. I didn't hear you sir? A. One similar to this was what they used to beat the lock down off of Death Row door.

Q. Now, is that the second door? A. Second door. This door right here.

Q. Who was using it? A. The first man that used it was Curley DeLapp.

Q. After they got the door down, what happened? A. DeLapp was the first man in, and immediately followed by—immediately following him was Noble. Quite a few had filed in and Kenton followed up, and I can't remember exactly when Hoover came in, but he was in there after a bit. I recognized him and seen him.

Q. What happened to Vidauri? A. I didn't see him after I seen him in Death Row proper there, in this place here, I didn't see him anymore after that.

Q. You say you saw him inside of the first door? [204] A. He was inside the first door. I didn't see him after that.

Q. What happened to you? A. I was ordered to sit down on a little stand table similar to this, not quite as high, and they was giving me, what is termed in the prison, as a shake down, they gave me a shake down, and was looking for my keys.

Q. What keys were they looking for at that time? A. Death Row keys.

MR. HENNELLY: I am going to object. No. 1, for the reason that the persons have not been properly identified, and under those circumstances, it is too vague, indefinite and uncertain, and for the second reason, that what keys they were looking for will be a conclusion with respect to this witness.

THE COURT: Sustained, and that answer may be stricken and the Jury is instructed to disregard it. This witness may testify as to what happened, but not as to his conclusions as to what others were doing.

Q. You tell just what happened.

THE COURT: Well, let's direct a question to him so that there won't be any, so that the testimony will not be a conclusion.

Q. Tell what happened then? A. At the shake down they give me?

[205] Q. Now, who is they? A. Kenton was the one, he was the one that pulled my coat open and reached in and got hold of the lining and yanked the inside of the lining, pulled it down, completely out. And there was a cabinet between me and the Death Row cage door. Now, that is the cage door, that is this door there. That is this door right here.

Q. This door? A. This door.

Q. Are you pointing at the door marked No. 3 on there? A. No. 3.

Q. All right. Did you have the keys to that door? A. No, I did not.

Q. Who was, who searched you, besides Kenton? A. There was a colored boy, and about a half a dozen others. I couldn't identify them now.

Q. Was Noble there? A. In the immediate vicinity. He wasn't just at the shake down.

Q. Was DeLapp there? A. He was just a few steps back.

Q. What happened then? A. DeLapp told me to call the Deputy Warden's office.

MR. HENNELLY: Object to that if Your Honor please, I don't mean to interrupt so often, but there again I take it is hearsay, for the reason that it is not done in the presence [206] of this defendant, and under those circumstances, it would be a violation of his Constitutional Rights, to admit it against him.

THE COURT: Overruled.

A. Shall I proceed Judge?

THE COURT: Yes, I believe your last statement was, DeLapp told you to call the Warden's office.

A. Deputy Warden's office, and I was asked to make the call to Colonel Whitecotton, and—

MR. HENNELLY: Object to this conversation or even to this section as to who answered the phone, for the

reason that that is hearsay, that being a conversation between this witness and Colonel Whitecotton, that obvi -ously—

THE COURT: There has been no testimony as to their conversation, and don't testify as to the conversation. The objection will be sustained however.

Q. Leave the conversation out. A. Immediately DeLapp taken the phone over from me.

Q. Now, Mr. Dietzel, what he said to Whitecotton and what Whitecotton said back is not admissible. You just tell me what was done after that, what did they do with you? A. I seen the Death Row cage door swing open, and Noble and some other inmates and Noble taken me by the shoulder like this and by this arm and taken me in ahead just like leading me forward there this way, and another inmate kept me by this [207] arm, and shoulder back this way, and I never could see who had me by the left arm and never did.

Q. Why couldn't you see?

MR. HENNELLY: Object to that, that will call for a conclusion and be a self-serving statement.

THE COURT: No, I think this witness could testify why he couldn't see, without it being a conclusion. He would be the only one who would know I presume, why he couldn't see. Overruled, he may answer that.

A. Noble told me, "don't look up Shaky".

MR. HENNELLY: I really hate to do this so much, but I will have to object again for the reason that is hearsay.

MR. RILEY: If the Court please, this is one of the co-defendants, this is Noble.

THE COURT: Overruled.

MR. HENNELLY: May I, for the purpose of the record, so that I don't have to interrupt the witness so often, may the record show that I am objecting to any and all

conversations and may the record show that I am objecting to it for the reason that it is hearsay and not done in the presence of this defendant, and to introduce it would be a violation of the Constitutional rights of the Defendant with respect to all conversations between anyone other than this defendant, and either Mr. Dietzel, or between themselves?

THE COURT: Well, I understand your objection, and of course I [208] appreciate the situation of wanting to save time, however, I don't know, I hesitate sometimes to allow just a blanket objection, because there may be some conversations that may not be admissible, and I wouldn't want your objection to go to matters that the Court might sustain an objection to.

MR. HENNELLY: Very well.

THE COURT: But I think to this general testimony, all right, but if there is anything that is out of line with what we have permitted this far—

MR. HENNELLY: Very well.

THE COURT: That your objection may stand. Now, you were testifying about Noble and some others leading you and that you couldn't look back, and the last question that was asked you was why couldn't you see, who had hold of your left arm.

A. Noble said, "Shaky, don't look around too damn much, it isn't healthy for you, don't see anything, it won't be good for you."

Q. What happened then? A. I didn't try to look around.

Q. I know, but what happened then? A. I was taken to Death Row and locked in a cell.

Q. Now, you know just which cell you were put in? A. Not exactly, but it was one of these two cells here. I couldn't say because I wasn't allowed to look around, but it was [209] about one of those two cells.

Q. How long did you stay there? A. I would have to give about—

Q. Your best recollection. A. Twenty or twenty-five minutes.

Q. Then what happened to you? A. Noble came back to me and said, "Shaky, I am sorry we are going to have to move you again," so they unlocked the door and taken me out and we went up the steps to B Hall, went up and we couldn't get up the steps, so they lifted me up and pushed me and lifted me up over the side of the wall like this and I had to reach up and pull myself up over the top, and put me in the mop room cell in B Hall itself.

Q. Now, did you ever see the Defendant Stidham in B Hall? A. Yes, the next morning.

Q. Well, forget about that then.

MR. HENNELLY: I ask that that be stricken Your Honor.

Q. I don't want to pursue it, if it was the next morning.

THE COURT: Well of course the question, and the answer was responsive to the question that was asked, and I can't see that it makes any difference one way or the other. The objection is overruled, it need not be stricken and the objection comes a little late, and the objection should be to the question and not to the answer.

Q. Now Mr. Dietzel, directing your attention—

[210] MR. HENNELLY: What I was objecting to was counsel's statement and not to—

THE COURT: I didn't hear counsel's statement, other than he said that is too late.

MR. RILEY: Too late, and I didn't want to pursue it.

MR. HENNELLY: I thought he said just forget about that.

THE COURT: I understood counsel to mean, or to intend that he didn't intend to pursue it further after he found out it was the next morning.

MR. RILEY: That is correct.

THE COURT: Go right ahead Mr. Riley.

Q. Mr. Dietzel, I direct your attention back to the time you say they were beating on the door and particularly the conversation you related between DeLapp and Stidham that they were going to try something else. You know what they tried? A. They tried to break through the brick wall between the Identification Room and the Death Row.

Q. Now, will you show the Jury on that chart where that wall is? A. I think it is marked here different than my calling. We have certain names down there. This is proper very likely, but this is the room that they entered into and this door here and this room right in here, about where they started trying to beat in with the sledge hammer and hammer and whatever [211] they used.

Q. Did you see them go in there? A. No, sir.

Q. Were they hammering on it? A. Which?

Q. Did you hear them hammering on it? A. I sure did.

Q. Now, did you hear any conversation between DeLapp and Stidham, at which anything else was suggested? A. I can't recall of it at the present, only that they were going to try something else immediately, and they went back into this room and couldn't get in there, and following that, when they found out they couldn't break in here, they give it up, and come back and produced a key and opened this door.

Q. Now Mr. Dietzel, I will ask you if you overheard any conversation between DeLapp and Stidham regarding the south windows?

MR. HENNELLY: Object to—

A. Yes, sir.

MR. HENNELLY: Object for the reason it is leading and suggestive.

THE COURT: Overruled.

A. Yes, sir, Stidham told DeLapp, said come around to the south windows and said you might make it there easier.

[212] Q. Did you ever see Stidham in Death Row, I mean after, did you ever see Stidham released from his cell? A. What was it?

Q. Did you ever see Stidham out of his cell in Death Row that night? A. Yes.

Q. Well now, Mr. Dietzel, what I mean, did you ever see him in Death Row out of his cell? A. No, no, no, I did not.

Q. Did you ever see Laster in Death Row out of his cell? A. No, I did not.

Q. You don't know if they went out, you don't know when they went out? A. I don't know nothing about them at that time.

Q. Your testimony is that they were in their cells before this disturbance or whatever you want to call it, started? A. They were there, that is right.

Q. I believe that is all.

Cross-Examination by Mr. Hennelly

Q. Mr. Dietzel, at the time of this incidence which was in September of 1954, what was the nature of your employment with the Penitentiary? A. I was employed as a guard.

Q. Would you say that you were an extra man sir? [213] A. I worked for the utility, what we term there as the bench work, worked off the bench, capable to fill any vacancy that is in the institution, that is, some guard can't be there and be in position to fill his place, that is my job.

Q. And how long had you been employed in that capacity at that time? A. In that capacity?

Q. Yes. A. Since November, 1949.

Q. Since November of 1949? A. Yes, sir.

Q. Now, since September— A. The exact date, I can't give you.

Q. Now since September of 1954, have you had some different types of a job at the Penitentiary? A. I am still working off of the bench.

Q. Are you what they call a Senior guard now? A. I passed the examination as a senior guard, right.

Q. And when did you do that? A. I had my notification, notified in this month, a week or so ago. I can't tell you the exact date.

Q. And you have testified for the State in about four of these cases, since that time, haven't you? A. Sir?

MR. RILEY: Since when?

[214] Q. Since the riot? A. Four.

Q. Four times? A. Yes, sir.

Q. Will this new position, will this give you some increase in pay sir? A. It does.

Q. Now then, on the night in question, at what time would you begin your work sir? A. The question please?

Q. What time did you go on duty on the night of September 22nd, 1954? A. Three o'clock.

Q. At three o'clock? A. Yes, sir.

Q. And at that time, did you— A. —

THE COURT: In the afternoon?

A. P.M., yes. I have been on this shift for—since—

THE COURT: That is all right.

Q. Three P.M.? A. Yes, sir.

Q. Did you immediately go then to B basement? A. Right.

Q. Did you relieve someone? A. I did.

Q. And were you the only one that was in charge at that time, of B basement? [215] A. That is right.

Q. Now then, I will ask you, during the five or six years that you had been in the Penitentiary, working in the Penitentiary, is there always a man on duty in B basement? A. In B basement?

Q. Yes. A. Yes.

Q. So that is a round the clock situation, isn't it? A. That is right.

Q. All right. And when was the last time, prior to the night of September 22nd, that you had been assigned to B basement sir? When was the last time before that sir, that you had had that same job? A. That is hard, I don't keep no records of where I work, it might have been six weeks and maybe six months.

Q. Either six weeks or six months? A. Because I work from job to job each day.

Q. And so you hadn't had any contact with any of the men that were in Death Row, for a minimum at least of six weeks before the night of September 22nd, is that right? A. Of any of the men?

Q. Yes. A. No, I couldn't make no, I couldn't say positive.

Q. Couldn't say? A. No, I couldn't, because I was in there and there was too many men there to remember which man is which in the institution, and I worked all over it.

[216] Q. All right. Now, taking into consideration this night, and attempting to fix the time that these matters took place there sir, did you make a round of some sort, or did you have to check your men? A. That is right.

Q. All right. Now, what was the first time that you checked your men, if you recall? A. Immediately after I went on duty.

Q. That would have been sometime after three o'clock? A. Right after three.

Q. And were you, were the rules of the institution such sir, that you would check them again sometime after that? A. That is right.

Q. Now, had you made the second check? A. I had.

Q. Can you tell the Court and Jury at what time you made the second check? A. About six-thirty.

Q. About six-thirty? A. Yes, sir.

Q. Now, at that time, when you made your second check, were the men in their cells? A. They were.

Q. Do you know, did you see Mr. Stidham in there at that time? [217] A. Yes.

Q. Do you know what cell he was in? A. No, I can't recall back.

Q. Did you see Mr. Laster in a cell? A. He was.

Q. Did you at anytime, from three o'clock on, the day that you came in, did you let the men out of their cells at anytime? A. Out of Death Row?

Q. Yes. A. No, sir, absolutely not.

Q. Was it your, did the men ever get out of their cells in order to take a shower or anything like that? A. No, sir.

Q. And you have been working there for about six years, is that right? At least inside of the Penitentiary? A. A total of inside?

Q. Yes. A. Since August 16, 1948.

Q. Now— A. The last time I had employment there before.

Q. Now then, after you had made your first check, what was the next thing that you did sir, did you take some position near one of those doors, or just what were your duties then? A. Just routine. I checked also B basement, C basement, Death Row.

[218] Q. All right, so that you do leave this general area then to go to C basement then, do you? A. Why sure.

Q. Now, where is C basement? A. This side, it is this side of this building here.

Q. And after you left, when you go over into C basement, is there anybody over here that is guarding these doors or anything? A. Those doors are all locked.

Q. You have got a key, do you sir? A. Yes, sir.

Q. All right. Now then, I will ask you sir, after you had finished the second count, which you stated was about six-thirty, did you then proceed to make the same rounds, did you go over into C basement after your second round of the Death Row? A. Sir?

Q. After you checked the men for the second time in Death row, which was about six-thirty, did you leave there then and go over to C Hall then sir, to C basement rather? A. Not after that, no.

Q. Well, after you checked the men the second time, did you ever at anytime leave the floor, or this general area which is marked on State's Exhibit 1? A. I never left Death Row after six-thirty.

[219] Q. All right. Now at six-thirty— A. When I taken that count, I can't state exactly, but about this period of time, I never left Death Row.

Q. Very well sir. Now, at six-thirty on the night of September 22nd, 1954, was it dark outside yet? A. No.

Q. You know what the weather conditions were that night sir? A. No, I don't.

Q. You don't know? A. No, I don't recall. As I remember, it was fair.

Q. Very well. Now then, I will ask you Mr. Dietzel, after you finished that round at six-thirty, did you then go and sit someplace there or sit at a desk or take some position there? A. You want to know what I did after six-thirty?

Q. I want to know where you went. A. After six-thirty, I lowered the windows and that is when Stidham demanded me to leave his window up.

Q. I see. And then you— A. Laster demanded to have his left up.

Q. And did you then come back and take, and sit down here someplace sir? A. In line with this.

Q. You say in line with this, are there some chairs or a desk [220] there or— A. Chair and desk there so you can have observation all down there.

Q. And that would be a chair and a desk then that would be right in front of a gate, gate No. 3? A. Nobody over here at this wall.

Q. Would your back be toward the— A. No, my back was, I was sitting on the south wall where I can observe this length and this line.

Q. All right. A. Now then, I could see all down this way.

Q. After, can you give the Court and Jury any idea of what time it was, after you went back to close those windows and you came back and sat down to begin your regular routine, would you say that that was as late as a quarter to seven then sir? A. I couldn't state.

Q. Well, at least it was after six-thirty, wasn't it? A. Yes, sir, it was.

Q. Now, had you seen any other inmates in and around there other than those that were in Death Row? A. In the institution?

Q. In this building sir, in B basement?

THE COURT: After six-thirty?

Q. After six-thirty? A. The porter is in B basement and he [221] was over in B basement.

Q. Who was? A. The porter.

Q. What is the Porter's name? A. Blue, I don't know his name, he goes by the name of Blue.

Q. And did he, did you see at anytime around six-thirty, did you see Mr. Trout? A. He wasn't in B basement.

Q. All right. A. He was in, not after six-thirty, he was over here.

Q. Mr. Trout's room is where? A. In the plumber's room.

Q. Plumber's room? A. Yes, sir.

Q. Now, how long had you been there, sitting there at your position sir, before you heard something unusual or saw something unusual, after you had gone back to those windows? A. The disturbance as I call it, was before, was at that time about six-thirty.

Q. Well, had you gotten back and sat down already? A. After six-thirty?

Q. Yes. A. This is the place where we sit, where we rest.

Q. Yes. A. But after six-thirty, I don't recall [222] ever sitting down.

Q. So that if I understand correctly then, when you finished that second round and when you checked those windows, you didn't sit down then? A. No, sir, not any period of time, I may have sat down, and I was up on the move, and it wasn't sitting time Mister.

Q. Was there something unusual going on already at that time Mr. Dietzel? A. Certainly was.

Q. And were there some people down inside of the B basement by that time sir? A. No.

Q. Now, how long was it before anybody other than the regular people who were confined in B basement came down into B basement? A. Sir, I can't give you the exact time, it was a period of time before they came in there. It was dark.

Q. Was it dark yet at six-thirty? A. No, it was getting, probably getting, sun lowered probably, but no, it wasn't dark down there.

Q. But by the time they got down there, it had already turned dark out, is that right? A. As I recall, it was dark.

Q. Now, can you give this Court and Jury any idea as to what time that was, was that seven-fifteen? [223] A. Yes.

Q. Sir? A. You say seven-fifteen?

Q. Yes, which would have been about forty-five minutes after your check was made, your second check sir? A. Could have been, or maybe a little more, I couldn't tell you exactly sir. I couldn't give you the exact time.

Q. So that it was at least seven-fifteen, is that your testimony sir? A. It was after six-thirty. I couldn't tell you, I sure couldn't.

Q. All right. Now then, where did you, did you see some men come in down there?

MR. RILEY: If the Court please, I think counsel ought to—come in down there doesn't indicate anything.

Q. I will rephrase the question Your Honor. Did you see some men who were not normally inmates of B basement come in any of these doors up here? A. No, didn't see them come in up here.

Q. Where did you see any of them come in? A. They were all down in front, down here when I saw them.

Q. All down there already? A. I had to come down these steps of course, but I didn't see them come down.

Q. They had— A. They had to come down these steps, [224] but I didn't see them come down.

Q. You couldn't see them from where you were? A. At this time here, no, but in the meantime, I was—after they started hammering, I moved down here.

Q. But when you were down in here, you couldn't see out in here, is that right? A. Yes.

Q. Now then, can you give the Court and Jury in numbers any idea of how many men came down there? A. Back here?

Q. Yes. A. I have no idea.

Q. Well, would you say there was as many as two hundred or three hundred? A. No, I have no idea of how many was in here. I couldn't make an estimate, be-

cause I couldn't see only a few men, the bodies of a few men along these bars here. Here I couldn't see.

Q. Mr. Dietzel, do you remember testifying in the Rollie Laster trial, the first one of these cases tried in Jefferson City, do you recall that sir? A. Yes, sir, I can tell you what you want me to say.

Q. Well, have you read this over sir? A. No.

Q. I am going to ask you sir, page 47, I am going to ask you if this question was asked you and this answer given. May the [225] record reflect that I am reading from a transcript of the Laster trial, and which is the first trial, and counsel has a copy of it.

THE COURT: Page 47.

Q. Page 47. "Q. How many men boiled into that hall, into B basement side? A. It was a continuous pile of men and boys for the whole time I was there, but I could see, observe anywhere between one hundred and fifty to five hundred men, and I am sincere in that estimate; they were coming and going and pushing through."

MR. RILEY: If the Court please, I object to that, they are not talking about the same place.

THE COURT: Let me see this.

MR. RILEY: You asked him about coming into B basement side.

MR. HENNELLY: Let me check it. I don't want to mislead him. Let me check it.

THE COURT: Is B basement side different than Death Row?

A. He was pointing out here—

THE COURT: No, I am asking you a question, is B basement side, is that different than Death Row?

A. They are on the east end of the B and C basements, and Death Row and the B hall is the colored segregation for newcomers along on B basement side. They are both on the same side.

MR. HENNELLY: For the purposes of this record, I will withdraw [226] that question until I can make sure that this is the same place Your Honor.

THE COURT: All right.

Q. Can you give the Court, can you point out to the Court and Jury where B basement side is there? A. This is B basement over here, all of B basement. Death Row is included in B basement. This is B basement. This is the lobby out here between B Hall and C Hall basement.

Well then, let me ask you this sir, at the first time that you saw any man there, can you give us any idea of the number that you saw, either in the lobby or in the B basement side? A. I testified one hundred and fifty to five hundred men, and that estimate might be plenty low because that was after they broke B basement open and B basement door and came into B basement proper sir, and then there is where I seen the men, that is where my testimony was.

Q. Now, let me ask you this sir, the first time that you saw any men then, they were in the lobby here? A. Yes, sir.

Q. And you can't give us any idea of the number that you saw then? A. No.

Q. Now then, what did those men do sir, that came in at that time?

[227] MR. RILEY: Came into where?

Q. Came into the lobby? A. DeLapp, Curley, made contact by voice to Slick Stidham down here in a loud voice, and stating as I said a while ago, in the testimony. That was the first observation that I knew that it was men working in there, and the bodies of the men, I couldn't see, just a few men up in front.

Q. All right. Now then, was there a lot of noise down there? A. There was.

Q. Was everybody hollering down there sir? A. More or less at the time, they were loud, and at times not so loud. That is hard to state exactly. It would be hard to make an exact statement.

Q. But your testimony is you heard a conversation between DeLapp and Stidham? A. That was later, that was between the two. I was in between the two men and I could hear them.

Q. Now, can you give the Court and Jury any idea as to what cell Stidham was in now? A. I don't recall. He was back there somewhere. I don't recall the exact cell.

Q. Now then, did those men begin working on one of those doors? A. Started in on B basement door.

Q. Now, can you give the Court and Jury any idea, any idea of [228] how much time they spent working on B basement door? A. Not exactly. They were there a good long period of time.

Q. Now, when you say a good long period of time, do you mean forty-five minutes or an hour or a half hour, or how much time do you mean sir? A. I would hate to make a statement. I am afraid I couldn't make an exact statement, because I never thought of looking at my watch and had no reason to, and I just can't recall the time. I just can't.

Q. Can you give us any idea sir, of how much time they were there at the B basement door? A. The first time they were there, they could have been there twenty or twenty-five or thirty or fifty minutes. I couldn't say exactly as to the time.

Q. Now, did they break open the door at that time? A. No, they didn't.

Q. Now, can you give us any idea of what time it was when they left that door, would you say it was as late as eight o'clock when they left that door? A. No, I can't,

I couldn't make a statement. I just don't have no idea of the time.

Q. All right. Now, where did they go from that door sir? Point and show the Jury. A. To this room, it is marked Christian Science and we guards called it the classification room.

[229] Q. It is marked here Christian Science? A. Yes, sir.

Q. That is really the classification room? A. That is what we called it, us guards, now I don't know what the official name is, they give them different names, and we have nicknames for different places, but this is the place that they beat the wall in to break into Death Row proper. They left this door here and went to this room here.

Q. Now Captain Shaky, Captain Dietzel, at the time that they were pounding on this door, where were you? A. On this front.

Q. And at that time, did you have some keys with you sir? A. No.

Q. Where had you gone with the keys? A. I disposed of them.

Q. You disposed of them? A. Yes, sir.

Q. All right. And where did you dispose of them?

MR. RILEY: If the Court please, I don't think it is material what he did with the keys.

THE COURT: Come up here gentlemen. (Out of the hearing of the Jury) What is it now Mr. Riley?

MR. RILEY: He doesn't want to tell what he did with those keys that night. He hid the keys, but he doesn't want to tell, and he asked me not to make him tell what he did with [230] those keys that night. I don't know why he feels that way unless it is because he is still inside of the Penitentiary.

THE COURT: Let me ask this, were the keys ever found, ever used in any of this matter that went on there in the prison?

MR. RILEY: Somebody got them later on. He didn't know where or how they got them, because they didn't get them from him.

THE COURT: Well, were they used in opening any of these doors or is there any testimony to that effect?

MR. RILEY: He testified that they got them from someplace. That was his first testimony.

THE COURT: Well, were these his keys that they got?

MR. RILEY: I don't know. He doesn't know either.

THE COURT: Let him go ahead and answer. I don't see that it can make any difference. He said he hid them. Is there any particular point in wanting to know Mr. Hennelly?

MR. HENNELLY: Only that the evidence is that somebody opened that door later on, and I want to know where they got that key to open that door.

MR. RILEY: Which door are you talking about?

MR. HENNELLY: The Death Row door that had been opened.

MR. RILEY: I don't think you are talking about the same door key.

MR. HENNELLY: Whatever keys he got.

THE COURT: All right, lets go ahead.

MR. DIETZEL: (Out of the hearing of the Jury) Your Honor, [231] that is a very personal question with me, me and the key. The inmates never did use my key. That is sworn testimony. They never did use my keys.

THE COURT: The question is here, what was it that you did with the keys? You said you hid them.

A. I disposed of them.

Q. Disposed of them, and the next question was where did you dispose of them.

MR. HENNELLY: The question is Mr. Dietzel, where did you dispose of the keys?

MR. RILEY: If the Court please, I would like for counsel to make it more specific, what keys he speaks of.

Q. The keys you disposed of.

MR. RILEY: Keys to which door?

THE COURT: Lets find out what keys he had.

Q. What keys were in your possession that night Mr. Dietzel, the keys to which one of these doors? A. The key to this door and Death Row and Death Cage, and safety keys to these.

Q. So that you had the keys to doors 1, 2, 3 and some safety keys, is that right? A. Yes, sir.

Q. Now, when you indicated you disposed of the keys, did you dispose of all of those keys? A. Yes.

[232] Q. Where did you dispose of them? A. That is personal.

THE COURT:

Q. Nothing personal in the trial of this case, you will answer the question. A. I hid them in the clock.

Q. Hid them in the clock? A. Right.

Q. Now then, after the men left this door, door No. 1, and I believe you indicated that they went to a position which is now marked on this exhibit as the Christian Science Chapel. A. I didn't get the first question.

Q. After they left the position, Position No. 1, did they then go to a position over here near the Christian Science Chapel? A. Right.

Q. Where were you stationed during that time Mr. Dietzel? A. In this position along here.

Q. Now, how much time did they use up in knocking on this wall here which is now the position, the second position that they took up at the Christian Science Chapel office, or as you call it, the classification room? A. I can't say. Time just flew so fast, that I just don't know, I honestly can't tell you.

Q. Very well. Let me ask you this, did they take as much time as they took working over on that first door? [233] A. I don't think.

Q. Would you say they took as long as half an hour sir? A. I don't know.

Q. You don't know? A. No, time was just a matter of lapse, I couldn't give you the time, didn't mean a thing.

Q. Now, could you see them working on this side here at the classification room? A. No, sir.

Q. Where did they go from there? A. Came back to this door.

Q. To Door No. 1, the first position that they were in? A. Yes, sir.

Q. How much time did they spend there? A. A short time, just when they found the keys and came in.

Q. All right now, who was the first man you saw with a key? A. I don't know the boy.

Q. Had you ever seen him before? A. Not as I remember.

Q. Was he a white man or a colored man? A. I don't remember now.

Q. I am going to ask you— A. Not now, I don't remember.

Q. You don't remember now whether it was a white man or a colored man? A. At the time I did, but I have forgotten now.

[234] Q. Now, I will ask you Captain Dietzel, Mr. Dietzel, at the time that they finally got the key and got in, were the lights on down there sir? Were there lights burning downstairs? A. Just one in Death Row.

Q. In Death Row? A. Yes, sir.

Q. Were there lights burning out in the lobby? A. I don't think they were, because, no, I don't think they were burning in the lobby.

Q. Very well. A. That is back out here?

Q. Yes. A. I don't think they were. I couldn't see the men in the back here, and if they were, I could have seen them directly through. There may have been in this part, but where I was looking, I couldn't see.

Q. You didn't put out any lights that night yourself, did you? A. No, I didn't.

Q. Now, I will ask you sir, was there any water on the floor around there at the time that those men broke through? A. No.

Q. The water hadn't come through then yet, is that right? A. No.

Q. Now then, as they came through, about how many men came through that door sir? A. Which door?

[235] Q. Well, which was the first door they broke in? A. B basement door.

Q. That is No. 1 door? A. Yes.

Q. Now, how many of them came in there sir? A. I testified one hundred and fifty, possibly five hundred men, as I said a while ago. Maybe, as I said a while ago, maybe more or less. That may be a low estimate.

Q. You say that might even be a low estimate? A. Yes, sir.

Q. Now, those men sir, were they armed? A. Yes.

Q. Did you see some of them with knives and brickbats and sticks and things like that? A. Yes, everything imaginable, every imaginable weapon you could think of, outside of a firearm.

Q. Maybe as many as five hundred of them then, is that right? A. I wouldn't make a statement on that.

Q. All right. Now, after they came through that first door, where did they go Mr. Dietzel? A. They milled around in here, and started to break this door down.

Q. Well, they got through here, didn't they? A. This door here and in here. Now, Death Row— here

is where they dwelled in here a while, and DeLapp taken a sledge [236] hammer, this caliber and this size, and started beating on this door into Death Row.

Q. Now, which one is that? A. That is right here.

Q. In this Death Row Cage? A. Not the cage, Death Row proper. That is the door between B basement and the negro side, and Death Row over here. This row right here, No.2.

Q. This is the door that you are talking about, not this one? A. No, there is no door there.

Q. This one here? A. No. 2.

Q. Now, can you tell us, give us any idea of what time it was that DeLapp was pounding on door No. 2, was it nine o'clock at night, or eight o'clock? A. At present, I can't recall. I can't recall it was after they broke in here, immediately after they broke in.

Q. Can you give us any idea of how long it took them to get through No. 2 door? A. Oh, possibly, they quit this door here, Death Row door, and went back out into the Christian Science Chapel, this original place, and beat some more there the second time, and they thought they could see a crack there, and they went back just a short time, maybe five or ten minutes, and they came back down and used a crowbar, pried out in between the lock and got in like this, and hit it and drove it in and got it [237] loose, and then they started beating with a hammer again, and beating the lock again. DeLapp reached through the bars and picked up the tumblers and put it out, or pulled it out, and then the door swung open, and turned them into me.

Q. Now, when they did that sir, would that be the door that would open up the cage door? A. No, no.

Q. Very well. When you said that he did that, referring to the tumblers, what door did he open up? A.

Death Row door between B basement and the negro side and the Death Row.

Q. In order to get back in here, they would have to open up a third door? A. That is this door here.

Q. Now, how long did it take them to break open that door? A. As I recall it may have been a dozen licks hit on that door.

Q. Would you say then sir, that the Death Row door took considerably less time to open than the rest? A. A very short time. They found some keys someplace that worked.

Q. Found some keys? A. Yes, sir. They had keys, and I don't know where they got them.

Q. You know who had those keys? A. No, I don't.

[238] Q. Was he a white man or a colored man? A. It could have been either, I can't recall at the present. I just can't recall at the present.

Q. All right. Now then, who was the first one to come in and contact you sir, which one of those men was the first man to come up to where you were after they broke through the third door? A. Second door?

Q. They contacted you at the second door? A. Yes, sir.

Q. Who was the first man to do that? A. DeLapp.

Q. All right. Now then, I believe your testimony is sir, that they took you and put you in one of the cells? A. Yes, sir.

Q. And do you know which one it was, which cell it was? A. Not exactly, somewhere along here.

Q. By that time all of the doors in Death Row then had been opened, had they sir? A. Well, they put me up there, they were, yes, at that time they were all open.

Q. Now, were the lights out back there in Death Row by that time? A. No.

Q. And can you give us any idea, were there any lights in there, [239] on the wall or ceiling, or anything like that? A. In the, above the ceiling.

Q. How many lights are in there sir? A. I can't give you any exact number. I can't tell you how many. I never had no reason to count them.

Q. All right. Let me ask you this sir, at anytime while you were in there, and before they moved you upstairs, did the lights go out downstairs? A. No, not while I was there.

Q. So that while you were downstairs, the lights were on all the time, is that right? A. Yes.

Q. Is that correct? A. That is right.

Q. No further questions Your Honor.

Redirect Examination by Mr. Riley

Q. Mr. Dietzel, I show you what has been marked as Plaintiff's Exhibit No.7, and can you tell the Jury what that is? A. That is the Death Row cage.

Q. Are any lights shown inside there? A. Up over the ceiling.

Q. You will have to show the Jury. A. Up on the ceiling, there are lights up here, sufficient lights to light the cells, and the hall. There were other lights in the building, but these are the main lights.

[240] Q. Now Mr. Dietzel, you say you are a senior guard there now? A. Yes, sir.

Q. Now, is that under the recent merit system that has been put in force? A. Yes, sir.

Q. And the money you make now, other guards gets the same, got the same raise, didn't they? A. All the other guards that passed the examination, draw the same as I do.

Q. Now, Mr. Dietzel, you were the only guard down in B basement that night, weren't you? A. That is right.

Q. On duty? A. Yes, sir.

Q. And what time did you finally get out of the B Hall altogether? A. When I got out of B Hall?

Q. Yes, B and C Hall, or B Hall, not C basement? A. The next morning.

Q. All right. A. It was daylight, I don't know what time it was.

Q. You were scared weren't you Mr. Dietzel?

MR. HENNELLY: Object to the form of that question.

THE COURT: Well, it is leading, and the objection will be sustained.

[242] Q. I believe that is all.

MR. HENNELLY: No further questions.

MR. RILEY: Call James Creighton.

MR. HENNELLY: May the record show that after the State had called the witness, James Creighton, that counsel for the Defendant represents to the Court that he is in receipt of information to the effect that this witness is of unsound mind, and is consequently incompetent to testify before this Court, and the Defendant asks the Court for a hearing to present that evidence to this Court for the purpose of the Court determining as a matter of law, whether or not the Defendant, whether or not this witness is even competent to take an oath or to even testify in this Court.

THE COURT: All right, you can show the Jury is excluded Mr. Ehlers, and let's proceed with what testimony you have to offer relative to this witness.

MR. HENNELLY: Very well Your Honor.

The Jury was then excused, and the following proceedings were had outside of the hearing of the Jury.

MRS. ALMA MILLER,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Hennelly

Q. What is your name please? A. Alma Miller.

Q. Now speak up Mrs. Miller, so that this gentleman writing [242] this down can hear everything you say. A. I will do my best.

Q. That is Mrs. Miller is it? A. Yes, sir.

Q. Where do you live Mrs. Miller? A. Fulton, Missouri.

Q. Fulton, Missouri? A. Yes, sir.

Q. What is your occupation? A. I am medical records clerk at the State Hospital.

Q. You are the medical records clerk at the State Hospital? A. That is right.

Q. Just what is the name of the hospital of which you are the Clerk? A. State Hospital No. 1.

Q. And you say you are the records librarian there? A. Well, no, that isn't my classification, but that is what I do.

Q. I am sorry. Are you the Official Custodian of all the records of the patients at that hospital? A. Yes, sir.

Q. And are those records kept under your custody and control? A. Yes, sir.

Q. Pursuant to a subpoena duces tecum, which was issued out of this Court, have you brought with you the records of the [243] treatment of one James Creighton? A. Yes, sir.

Q. And do you have that record with you? A. Yes, sir.

Q. And is that a record which is kept in the normal course of the business up there? A. Yes, sir.

Q. And it is one of the official business records of the hospital? A. Yes, sir.

Q. And you are custodian of that record, is that right? A. Yes, sir.

Q. May I have it please? Will you mark this Exhibit B.

Reporter marked Exhibit B, hospital record.

Q. Now, I want to offer this in evidence, if Your Honor please.

MR. RILEY: You mean the whole record?

MR. HENNELLY: Yes, there may be parts of it that are inadmissible, but this is the entire record.

THE COURT: Have you checked it over, and do you know what parts you are referring to here?

MR. HENNELLY: Yes, You Honor.

THE COURT: This is quite a lengthy record.

MR. HENNELLY: Do you want me to separate it?

MR. RILEY: Let me ask this witness some questions first.

[244] MR. HENNELLY: All right.

Cross-Examination by Mr. Riley

Q. Mrs. Miller, the material contained in this file, now you didn't make this up, did you? A. Not all of it.

Q. Well, you don't know who did, do you? A. No, I don't know.

Q. Will you speak a little louder? A. No, I don't know.

Q. You don't know who made this material up, do you? A. Not all of it.

Q. Yes. And what did you make up? A. I made up the progress notes and the admission sheet and that is all I made up.

Q. Made up the progress notes and the admission sheet? A. Yes.

Q. And you don't know who made up the rest of it, do you? A. Well, some in there, I know who made it up.

Q. Well— A. The longhand is Dr. Price's.

Q. And all the rest of it you don't know who made this up, do you? A. No, sir.

Q. You weren't present when it was made up? [245] A. No, sir.

Q. Now, even on Dr. Price's, you don't know, you didn't see him make that up? A. But I know his handwriting.

Q. Yes, but you didn't see him make it up? A. No, sir.

Q. And outside of that, the rest of the record, you don't know who made that up at all? A. No, I don't know.

Q. You will have to speak up so the Court and the Court Reporter can hear you. A. No, I don't know who made it.

Q. And you weren't there when it was made up? A. No, I wasn't.

Q. Now, the only thing is, you take a lot of material, and data that someone brings to your desk, and you put it in this file, isn't that the way this is made up? A. No, all the data comes to a box that I have, my own box, and then I take it down and put it in my official records.

Q. You don't know who put it in this box, you were not there when they put it in, were you? A. No.

Q. And you are not willing to swear that these records are correct, or that you know who made them up? A. I don't know if they are correct or not, no.

[246] Q. That is all.

Redirect Examination by Mr. Hennelly

Q. Let me ask you this, how are these records stored out at the hospital? A. They are in a file down in the record department.

Q. Are they locked up at night? A. Yes, sir, they are.

Q. Do you have a key to them? A. Yes, sir.

Q. Now, Your Honor, to begin with, I don't think that a record which is kept in the normal course and scope of the business, that the record has to be made by the person who brings them into Court.

MR. RILEY: The statute says that the Court must be satisfied as to the mode of preparation.

MR. HENNELLY: I think Your Honor, that No. 1, they may be testified to by the doctor himself, No. 2, that they may be testified to either by the person who actually made them up, or by the official custodian of those records.

THE COURT: You have handed me here a file that consists of some number of pages. I can't see how many without taking it apart. I want to know what in that file is pertinent to the matter of adjudication of insanity. I think a person would have to be adjudicated insane before they would be disqualified [247] as a witness.

MR. HENNELLY: I don't think that would be necessary.

THE COURT: Well, you mean the Court would take notice of the insanity of someone who hasn't been adjudicated insane?

MR. HENNELLY: I think this Your Honor, that with the records of, an instrument of the State, which states that he is a homicidal maniac, or words to that effect, that that official record of the State Hospital, made by competent doctors, and we won't take into consideration that this man is an inmate of an institution, and will probably never be declared incompetent, because that is not in the normal course of events done with a person who is in a Penitentiary, then I say that under those circumstances Your Honor, that if the records are proper and if

they are properly admissible, and if they reflect his incompetency, it isn't necessary that he be officially adjudged incompetent by a Probate Court or Court of Competent Jurisdiction, to show a judgment—

MR. RILEY: Just a minute Mr. Hennelly, you don't represent to the Court that there is any time period shown in that file which would cover from September 22nd, 1954, down to this date, do you?

MR. HENNELLY: I represent to the Court, that at the time he left the hospital, that he was, that they said he was a homicidal maniac and that he was then taken to and placed in Death Row and that there was no subsequent statement of any [248] kind by any competent—

MR. RILEY: Will you show me where that file shows that, will you sir?

MR. HENNELLY: Very well.

MR. RILEY: Who made that up, will you show me who signed that?

MR. HENNELLY: This is a part of the official record dated April 14, 1954, signed G.D.H.

THE COURT: Mrs. Miller, do you know who G.D.H. is?

A. No, I don't.

MR. RILEY: Mrs. Miller, you don't have anyone in your hospital with those initials?

A. I don't know.

MR. HENNELLY: This is the one that I have in mind Your Honor.

THE COURT: Let me see that. You have marked the whole file as Exhibit B.

MR. HENNELLY: I just had it marked for identification, as Exhibit B.

THE COURT: Is that the only part of it which you wish to introduce, and if so, I think it should be designated by some exact exhibit number, make it C or whatever you want to.

MR. HENNELLY: There is a number W42266.

THE COURT: Does the number W42266, does that number mean anything to you?

A. No, sir.

[249] THE COURT: I want these pages that you have just referred to, there is three pages, no, two pages is all you showed me, and that is all I read. I am not going to read through this whole file of impertinent matters. I will ask the Reporter to mark these two sheets of paper as Exhibit C and Exhibit C-1, and then mark this sheet as Exhibit D.

Reporter marked I don't Exhibit C, C-1, and D, sheets of paper in the file of James Creighton's hospital record.

THE COURT: All right, are you now offering C, C-1 and D?

MR. HENNELLY: Yes, Your Honor.

MR. RILEY: Before Your Honor accepts them, or refuses them, I want to ask this witness here some more questions.

THE COURT: All right.

Recross-Examination by Mr. Riley

Q. Mrs. Miller, I will show you what has been marked Exhibit D, and can you tell the Court who prepared that? A. No, I can't.

Q. And can you tell by whom it was prepared? A. No, sir.

Q. You can't say by whom it was prepared? A. Nothing only except up here where it is typed, says Dr. Price. It is just typed, it doesn't have his name signed to it.

THE COURT: Well the question was, do you know who prepared it.

[250] Q. Who prepared this information on this form? A. You mean who typed this up?

Q. Yes. A. Yes, I know.

THE COURT: Who? A. Yes, I know who did it.

Q. Did you see them do it? A. Yes, sir.

Q. How do you know? A. Because it has got his name signed up here.

Q. Well, because there is two typewritten letters, is that the only information you have? A. That is the only information I have.

Q. You didn't see it prepared? A. No, sir.

Q. You don't know what day it was prepared? A. That is the date up there.

Q. Other than the date, you don't know what day it was prepared? A. No.

Q. And it has no identifying signatures, whatsoever on it? A. No.

Q. I mean signatures and writing? A. No.

Q. If the Court please, at this time—

MR. HENNELLY: Might I ask her a couple of questions?

THE COURT: Yes.

[251] *Redirect Examination by Mr. Hennelly*

Q. This, which we have marked State's Exhibit, Defendant's Exhibit D, this is part of the folder of the official records of James Creighton, is that right? A. Yes, sir.

Q. And this is part of the same folder is it, that is kept in the normal scope and course of business? A. Yes, sir.

Q. Now— A. It is the original copy.

Q. Original copy? A. Yes, sir.

Q. Now, the physician in charge, Dr. Price, do you know him? A. Yes, sir.

Q. Is he a member of the staff? A. Yes, sir, as far as I know he still is a member of the staff.

Q. And who is S.A.? A. It is a patient, Stewart Allen.

Q. Who? A. Stewart Allen.

Q. You say that is a patient down there? A. That is right.

Recross-Examination by Mr. Riley

Q. You mean a patient in the insane asylum typed this up? A. Yes, sir.

Q. Well—

MR. HENNELLY: But this is kept in the normal course of business [252] is it?

A. Yes, sir.

THE COURT: I don't know whether that would be normal or not.

A. Far as I am concerned, it is normal.

MR. RILEY: You don't know when it was prepared or you just find it in the record?

A. I put it in there.

Q. You found it in a box? A. That is right.

Q. And you are not willing to swear that it is correct by any means? A. No.

Q. Because you don't know? A. I don't know, it isn't signed.

MR. HENNELLY: That is our offer Your Honor, I am offering it. Let me say this in all sincerity. A librarian certainly couldn't see the records made or couldn't make them all herself, because under those circumstances where you have thousands and thousands of records in a big hospital, and the person leaves, the validity of those records would be lost unless the Court permitted the record to be introduced by the person who is the official custodian of the records, and unless those records are kept in the normal course of business. Maybe Your Honor can recall, there is a recent case, no more than two or three years old, which really has all the law on [253] this thing.

MR. RILEY: That is the Melton case.

MR. HENNELLY: Uniform business case.

THE COURT: Let me ask you this, are you making an objection to their introduction?

MR. RILEY: Yes, sir.

THE COURT: Do you want to state your objection into the record?

MR. RILEY: I object to it for the reason that this record, this exhibit as it is presented, does not present a record of an act, a condition or an event that is really named to any issue in this case, and for the further reason that the witness here has not testified to its identity, has not identified it as being the—the mode of its preparation, nor does she know by whom it was prepared, nor does she know that it was prepared at or near the time of the act, condition or event, which it purports to show, and for the further reason that the exhibit constitutes opinion and conclusion and is hearsay.

THE COURT: Do you have other evidence relative to matters, the charge of insanity as against the witness that has been called?

MR. HENNELLY: This is the only evidence that I am going to offer in support of the motion, in support of a hearing to ask the Court not to accept him as a witness Your Honor, this [254] is the only evidence that I will offer at this time.

THE COURT: Now I think this. Inasmuch as this is outside of the hearing of the Jury, and this is an attack upon the—

MR. RILEY: Competency.

THE COURT: No, it is not competency, it is, yes, I guess it is, as to the competency of a person to testify, but not the competency of his testimony, but the competency of a person to testify, I am going to allow it to be received in evidence, for the purposes of this hearing on the competency. I mean it might as well be part of the record, and whatever records you are going to make, but if that is all

that you have as to the incompetency of the witness Creighton to testify, I am going to overrule your motion, because it is my opinion that the incompetency of the witness must be shown according to the provisions set forth in the Statute, and the Statute provides the following: "Section 491.060. That the following person shall be incompetent to testify, One, a person of unsound mind at the time of his production for examination." Now, there is no one here who has testified or shown that there is a witness of unsound mind and Exhibit C and C-1, in its conclusion, states that he is a homo-sexual with homicidal tendency. That don't, I don't know, that may be some abnormality, but I don't know that it is proof of unsound mind, that is, that a person would be insane as a result of that. They might be just downright onery, with those tendencies, and then Exhibit [255] D, which has been offered and which will be received in the record for the purpose of preserving Defendant's record on this matter, is apparently a copy of a physician's report, purports to be a copy of a diagnosis, a conference and the result of the diagnosis of different doctors, five to be exact, and none of them show any insanity, in fact, one shows without mental disorder; anti-social reaction. And another shows his schizophrenic reaction, unclassified; another one malingerer, sociopathic personality disturbance unclassified; and another one psychoneurotic unclassified, and another one antisocial reaction with psychotic reaction, and then a final diagnosis of antisocial reaction. This man isn't committed to an asylum now, is he?

MR. RILEY: No, sir.

THE COURT: He isn't incarcerated or being held in an asylum?

MR. HENNELLY: No, he went directly from this institution to a place of isolation in Death Row.

MR. RILEY: That means nothing, your client was in the same place.

MR. HENNELLY: But he had not first been in this institution in the Penitentiary.

THE COURT: The man was in the Penitentiary and transferred over to the hospital, Hospital No. 1?

MR. HENNELLY: And then back.

THE COURT: And then back?

[256] MR. HENNELLY: And there is nothing in the official records of this institution to indicate that there has been any change in his condition from the time that he was placed in isolation in the Penitentiary.

MR. RILEY: Have you offered another exhibit?

THE COURT: He just offered these two, Exhibits C, C-1, and D.

MR. RILEY: I want to make my record on the other one.

THE COURT: I thought that your objection went to both of them.

MR. RILEY: I didn't make my record on this one. I want to make a record here on that.

THE COURT: On C or C-1?

MR. RILEY: Yes.

THE COURT: I will add to what I have said there, that the admission for this hearing outside of the hearing of the Jury is for the purposes of the voir dire examination of the witnesses to determine the sanity or insanity of the witness Creighton, and that by receiving it in evidence for the purposes as stated, does not mean that it will be received in evidence for any later purpose in the trial of this case in the nature of impeachment.

Recross-Examination by Mr. Riley

Q. Mrs. Miller, I show you what has been marked as Exhibit C and Exhibit C-1, and now can you—are there any identification [257] marks on there that shows that

was even made up in your hospital? A. Nothing only the date.

THE COURT: I can't hear you.

A. Nothing only the date, it had to be at our hospital while—because of the date on it.

Q. That is the only thing? A. Yes.

Q. I will ask you if those two exhibits aren't attached to a Missouri State Penitentiary letterhead dated in January of 1933? A. This is.

Q. Would you speak out loud? A. Yes, sir, they are.

Q. And I will ask you if that exhibit doesn't bear the Missouri State Penitentiary number of Creighton? A. Yes, sir.

Q. And nowhere does it bear your case number, number 28151? A. No, it doesn't.

Q. And can you tell the Court who made this record? A. No, I can't.

Q. Can you tell when it was made? A. No.

Q. And you can't say whether it is your record or anything about this record? [258] A. No.

Q. If the Court please, at this time we make the same objection to this one as we did to Exhibit No. D. Now I would like to have this letter and this one right here marked as our two exhibits.

Reporter marked Exhibit 14, a letter in Creighton's file, dated 5-18-54.

Reporter marked Exhibit 15, a letter in Creighton's file dated 5-18-54.

Q. Mrs. Miller, I show you what has been marked as Exhibit 14, and ask you if you can tell me what that is? A. A letter written by Dr. Cramer.

Q. Now, who is Dr. Cramer? A. Well, at that time he was Superintendent.

Q. Superintendent of what? A. State Hospital.

Q. And how do you know, do you know when this letter was written? A. No, I don't.

Q. Do you know when it was put in this file? A. No, I don't.

Q. And do you know who Dr. Cramer's secretary is? A. Yes, sir.

Q. Who is that? A. Mrs. Mary Jolly.

Q. And do you frequently file letters over there in the regular [259] course of business bearing this symbol of WYC/MJ? A. Yes, sir.

Q. You frequently file those after coming from the office of the Superintendent? A. Yes, sir.

Q. Now, I will show you what has been marked as Exhibit No. 15, and will get you to state what that is? A. That is a letter to Governor Donnelly, written by Dr. Cramer.

Q. And your testimony about Exhibit No. 14 would be the same as to this one? A. Yes, sir.

Q. As to who Dr. Cramer was and the initials on there? A. Yes, sir.

Q. Now, what are the dates of these Exhibits, Exhibits 14 and 15? A. May 18, 1954.

Q. Now, can you tell from your records here what date James Creighton left that hospital? A. May 20, 1954.

Q. Now, this May 20, you made this record yourself, did you? A. Yes, sir.

Q. At this time, we offer State's Exhibits 14 and 15.

MR. HENNELLY: I would like for the Court to read them. I have offered the whole thing already, so I can't be in a [260] position of objecting to any part of it. As a matter of fact, I offered the entire folder, because I think the whole folder is—

MR. RILEY: I would like for the Court to read those two exhibits.

THE COURT: Exhibits 14 and 15, may be received into evidence for the purpose of this hearing, upon the motion as to the credibility of the witness Creighton.

MR. HENNELLY: Competency of the witness Creighton.

THE COURT: Competency of the witness Creighton, and by the admission, the Court does not mean to say that either this or any other exhibit received with reference to this preliminary examination, outside of the hearing of the Jury, will be binding upon the Court in ruling upon further issues that may develop with relation to this witness. Now, as I understand the law, the Court is the judge of the competency of the witness for the purpose of putting that witness on the stand, at least that is the rule as to children.

MR. RILEY: That is the rule.

THE COURT: Whether children understand the nature of an oath, and the Court makes his preliminary examination to that effect. You may step down Mrs. Miller right now.

Exhibit C, having been received in evidence, reads in words and figures as follows:

[261] SOCIAL HISTORY

Re: James Creighton April 14, 1954
G.D.H.

No: W-42266

Social Data: Subject, a white male, age fifty, was born June 9, 1903, in Paris, Texas, an only child. His parents were divorced in 1913 and subject lived with both parents, going back and forth at will. He states his home life was not satisfactory. He liked school, but never had a chance to go. He did complete the 7th grade at Manitou, Oklahoma. He left home at the age of seventeen, because of a conflict with his parents. He never seemed interested in the normal type of activities as a boy. Subject mar-

ried Thelma Henderson of Breckenridge, Texas, the first time, this marriage ended in divorce in 1924 because of subject's incarceration. He married Zelma Howell the second time, in 1928, this marriage lasted only a few months. Subject's last marriage was to Velma Meek of Shawnee, Oklahoma in 1929. Two sons were born to this union. Subject and his wife were divorced in 1936. His work record was unstable, never having a job of any long duration. His occupation is listed as barber. Subject led a very nomadic life.

CRIMINAL DATA: This is subject's third felony conviction, having been convicted of the following: 6-2-22, Burglary 2nd., 2 years, State Ref., Granite, Okla.; 10-2-24, SP, McAlester, Okla., 5 years, Larc. of Auto; and 1-19-33, MSP, Life, Murder 1st. [262] He was paroled from the Reformatory at Granite, Oklahoma, but parole was revoked when he was sent to McAlester, 10-24-24. Version of Crime: See Classification Summary.

INSTITUTIONAL DATA:

Conduct: 9-17-45, Escape; 4-29-47, Setting fire to cell and burning another inmate to death; 10-7-52, Cutting another inmate; 10-14-52, Cursing the Captain.

Work: Subject has held many jobs here. He has not been able to adjust to any of them and has spent most of his time in solitary.

Health: Other than subject's mental condition, his health was considered normal.

Visits: Subject has had only eight visits while here. His last being on 6-22-52, when his son visited him.

STATEMENT OF PROBLEM: Subject has always been an institutional problem. He was first given the death sentence for his crime, but the Missouri Supreme Court

reversed the lower court's decision and he was given life. Subject's adjustment was poor from the start. He was moved from job to job and cell to cell. Sometime during the early part of his sentence he faked blindness for two years. He would use a nail to keep his eyes bloodshot. His reason for doing this is unknown. In November, 1943, he was given a chance on an assignment of trust on one of our farms. He escaped from the farm on 7-8-44, was apprehended and returned 9-15-45. On 4-29-47 subject set fire to a [263] cell and burned an inmate to death. There wasn't sufficient evidence to make a good case in Court. Subject was placed in Administrative Segregation, where he stayed until 2-25-49. On 10-7-52 subject cut an inmate. He attacked this man from the rear, slashing at his throat. The man pulled in his chin and the knife slashed him across the mouth and jawbone, which required 56 stitches to close. Subject stated he did this because the man handled his food. Subject

EXHIBIT C
LWE
7/18/55

Exhibit C-1, having been received in evidence, reads in words and figures as follows:

Case history of 4-14-54

-2-

J. Creighton Cont'd.

was placed in Administrative Segregation where he stayed until 3-22-54. On the morning of 3-22-54, subject and another inmate from Administrative Segregation were brought before the Disciplinary Committee for swearing back and forth to each other. While waiting to be called before the Committee, the other inmate tried to kill sub-

ject. The guards broke up the fight, but not before subject had a few head wounds. Subject was taken to the prison hospital for treatment. Once in the hospital room he would just sit on the floor, refusing to eat or move. He was transferred to the psychiatric ward. Subject [264] is considered a very dangerous inmate. He is a homo-sexual with homicidal tendencies. Prognosis is very poor.

Exhibit C-1
LWE
7/18/55

Exhibit D, having been received in evidence, reads in words and figures as follows:

CONFIDENTIAL: FOR PROFESSIONAL USE ONLY

State Hospital Number One	Hospital File Reference: 28151 CI.
Psychiatry and Neurology	Date Staffed: May 18, 1954
Fulton, Missouri	Physician-in-Charge: Dr. Price; sa

DIAGNOSTIC CONFERENCE EVALUATIONS
CREIGHTON, James

The diagnostic staff conference, May 18, 1954, was scheduled for the Biggs Memorial Building with the following physicians present: Wm. J. Cremer, M. D., J. Henry Fowler, M. D., Earl C. Kepler, M. D., Frank J. Nichols, M. D., and Robert P. Price, M. D. Dr. Price presented the above named individual for diagnostic evaluation, with a provisional diagnosis of: 000-x63.x1: antisocial Reaction with Psychotic Reaction. The above named physicians, and their respective diagnoses, are as follows:

Dr. Cremer: Without Mental Disorder; Antisocial Reaction

Dr. Fowler: Schizophrenic Reaction, Unclassified

Dr. Kepler: Malingerer; Sociopathic Personality Disturbance, Unclassified

[265] Dr. Nichols: Psychoneurotic Disorder, Unclassified

Dr. Price: Antisocial Reaction with Psychotic Reaction

DIAGNOSIS: 000-x61: ANTISOCIAL REACTION

sa, 5-18-54,
by direction

Exhibit D
LWE
7/18/55

Exhibit 14, having been received in evidence, reads in words and figures as follows:

18th May 1954

Henry V. Guhleman, M. D.,
506 East High St.
Jefferson City, Missouri

Re: James Creighton
MSP Reg. #-42266

Dear Doctor Guhleman:

I am today notifying the Governor relative to the transfer back to the facilities of the penitentiary, the above named individual. You may remember, this is the individual who smeared feces over himself and appeared not to notice anyone in his immediate surroundings, refusing to eat, etc.

This individual, shortly after his admission here, acknowledged voluntarily that he had malingered the entire picture in order to be released from solitary confinement. We, incidentally felt, he had some secondary thought that a [266] possible escape would be much easier for him at this institution. He does appear to be perfectly normal. All psychological and psychiatric workups indicate nothing besides his sociopathic personality situation. We are today, as stated above, requesting the Governor to transfer this individual back to the custody of the penal authorities.

Sincerely yours,

Wm. J. Cremer, M. D.,
Superintendent

WJC/mj

COPY

Exhibit 14
LWE
7/18/55

Exhibit 15, having been received in evidence, reads in words and figures as follows:

18th May 1954

Hon. Phil M. Donnelly
Governor of Missouri
Executive Office
Jefferson City, Missouri.

Re: James Creighton
MSP Reg. No. 42266

Dear Sir:

We are today writing you relative to the return of this individual to the custody of the penal authorities, as it is

the unanimous opinion of the medical staff of this hospital that he has recovered sufficiently from the symptoms that were [267] present on admission to this institution, to be returned to the penitentiary to resume his sentence.

Sincerely yours,

Wm. J. Cremer, M. D.,
Superintendent

WJC/mj

THE COURT: Now, let's call the witness Creighton out of the hearing of the Jury.

JAMES CREIGHTON,

BEING SWORN, TESTIFIED:

Questions by the Court

Q. Mr. Creighton, I want to ask you a few questions here, preliminary to you being called as a witness by the State, and outside of the hearing of the Jury. How old are you sir? A. Fifty-two.

Q. Fifty-two? A. Born 1903, 9th of June.

Q. 19th— A. 9th of June, 1903.

Q. 1903? A. Yes, sir.

Q. And where were you born? A. Well, I was born in Manitou, Oklahoma, Indian Territory.

Q. That is Indian Territory? A. Yes, sir.

Q. You are an inmate in the Missouri State Prison at this time? A. Yes, sir.

[268] Q. And how long have you been an inmate sir? A. Well, I have been there since 33, January 19th, 1933.

Q. January 19, 1933? A. Yes, sir.

Q. Where were you sentenced there from? A. Jasper County, and I took a change of venue from there and got a new trial over to Barton County, Lamar.

Q. You had how many trials? A. Well, I had two.

Q. And was there a reversal or something of your case? A. The Supreme Court reversed it the first time.

Q. And what was your sentence for? A. Rape.

Q. Well, what were you charged with, what crime? A. Homicide.

Q. Murder in the first degree? A. Yes, sir.

Q. And you received at first a death sentence and then your case went to the Supreme Court and was reversed and went back and then you received a life sentence, is that correct? A. Yes, sir.

Q. And that was in 1933, and you have been in the Missouri State Penitentiary since that time? A. Yes, sir.

Q. Did you live in Jasper County at the time of your conviction? [269] A. No, sir.

Q. Did you, where did you live, where was your home at that time? A. My home, at that time, was, I guess you would call it Shawnee, Oklahoma, that is where my family was.

Q. You were a resident of Oklahoma? A. Yes, sir.

Q. Did you, you had had some previous convictions prior to this? A. I had two.

Q. That you are now serving under? A. Yes, sir. They got it three, but it is only two.

Q. Mr. Creighton were you in the prison on the night of September 22nd, 1954? A. Yes, sir.

Q. In what was called, or referred to as Death Row, which was the night of the prison riot I presume that has been referred to, designated as, were you in a cell on that date, and at that time? A. I was.

Q. Did you know personally Walter Lee Donnell? A. I knew all of them. I celled next door to him.

Q. I mean did you know who he was? A. Yes.

Q. Would you talk back and forth in those cells? [270] A. Yes, sir.

Q. Could you hand anything back and forth? A. Yes, sir, there is a little hole there, I guess about that big around, and you push through a screen, see there is a screen stuck out about two foot and there is a hole punched through it, and you could pass stuff back and forth like letters and newspapers, etc., but there was a screen between the two cells and the hole punched through it.

Q. There was a screen between the two cells, and a hole punched through it? A. Yes, sir.

Q. Do you know and remember what occurred there on that particular night? A. I guess I do.

Q. On this particular phase of this examination, do you have any questions you want to ask, either of you, Mr. Riley you may ask anything you wish. Probably Mr. Hennelly should go first, it is he who has filed the motion. I don't want you to go into the details. I think this goes to the competency.

Examination Outside of the Hearing of the Jury by Mr. Hennelly

Q. Mr. Creighton, were you an inmate at the State Hospital? A. Yes, sir.

Q. How long were you up there? A. Oh, something like thirty-five days I guess.

[271] Q. Had you ever been up there at anytime before that time? A. No.

Q. Had you ever been confined to any mental institution prior to that time? A. No.

Q. Have you ever been in solitary confinement in the penitentiary prior to that time? A. Yes, sir.

Q. How long were you in solitary confinement? A. I guess about eighteen months.

Q. Eighteen months straight? A. Something like that.

Q. While you were in the State Hospital, were you strapped down? A. No.

Q. Sir? A. No.

Q. You were treated by a number of doctors up there, were you, examined? A. Well, I wasn't treated, I was examined.

Q. Did you attempt to slash a man's face just before you went up there? A. I didn't attempt to, I did.

Q. That was before you went up to the State Hospital? A. That is right, about eighteen months before I went to the Penitentiary. That is what I was in solitary for, if that [272] is what you are driving at.

Q. Did you kill any other people in the penitentiary? A. No, sir.

Q. I think Your Honor, that there is nothing else I want to go into.

THE COURT: Do you have any questions Mr. Riley?

MR. RILEY: No, I am satisfied, that the Court has asked enough questions.

Examination by the Court

Q. What were you sent to the State Hospital for, what was it? A. Well, I played crazy to go there, to tell you the truth about it. See, they have a system up there.

Q. System where? A. In the Penitentiary, that if you go to Fulton for thirty days—that is thirty days after you get back you get out of solitary on the yard and I had been over there about eighteen months, and so I thought up that deal and so I took the Fulton route to tell you the truth about it. They put it on there that I was going to escape and everything. You can't tell your business you know, because you can't get out of solitary see, and that is what I went over there for.

Q. And you got out of solitary and over to Fulton? A. No, this riot came.

Q. Then they put you back where? [273] A. Back for the thirty days, like they do new guys.

Q. In solitary? A. Yes, sir. This is a common practice in penitentiaries. I was trying to take advantage of the tradition over there and go to Fulton.

Q. Were you ever taken before a Probate Court to your recollection? A. No.

Q. And committed as an insane person? A. No.

MR. HENNELLY: I have another question Your Honor.

THE COURT: All right.

Examination by Mr. Hennelly

Q. Number 1, were you ever in a psychopathic ward of the Penitentiary? A. Before you mean I went to Fulton?

Q. Yes. A. No.

Q. Were you in there after you came back? A. I was in there after the riot, yes, they put me up there after the riot.

Q. All right. Did you ever attempt to commit suicide? A. When I went to Fulton?

Q. Yes, sir. A. Yes, sir, I did, I put them on a good act, yes.

[274] Q. While you were in Fulton or in the Penitentiary? A. In the Penitentiary before I went over there.

Q. I have no further questions Your Honor.

Examination by Mr. Riley

Q. Now Jim, why were you in the Penitentiary Hospital after the riot? A. Well, they put me up there like they did everybody else, and moved them around.

Q. What was the matter with you? A. Nothing.

Q. After the riot? A. Well, the only thing, my jaw was broke, and my lip and everything was cut up. They

had me on Three, and they had so many up there, and so they moved me up on Five.

Q. You stayed in the hospital? A. Yes.

Q. And your jaw was broke in two places? A. Yes, sir, two places.

Q. Wired shut? A. Yes.

THE COURT: Now then, in regard—I presume after this offering, you are renewing your motion?

MR. HENNELLY: Renewing my motion to have the Court declare, as a matter of law, that this witness is incompetent, in view of the hospital records from Fulton Hospital.

[275] THE COURT: That motion will be denied, and the witness will be permitted to testify. Now then, it is 9:20 and I believe we had better recess for the night, and you can take charge of the Jury. The witness is here too Mr. Sheriff, who is going to take charge of him?

THE SHERIFF: A deputy will.

THE COURT: Bring the Jury back in Mr. Brent.

THE COURT: Gentlemen, I want to say right at this point, that there are a number of times during the trial of a lawsuit, when it is necessary for the attorneys and the court to have conferences, as you have seen us have them, and there are many times during the trial of a lawsuit where it is necessary to exclude the Jury for matters to be taken up before the Court. Sometimes there are matters relative to the admissibility of testimony, competency of testimony and things of that kind that come up, which have to be determined before the Court can pass upon them, and until it can be determined whether that testimony shall or will be admissible into evidence, the Jury has to be excluded because there may be some matters that come up in the presentation of that, that are not proper to be presented before the Jury. I just merely wanted to say that, because we excluded you here a while ago, and you have been out for quite sometime, and it has taken a little bit

of time to go into one or two matters that have developed, relative to some of the testimony in this case, some of the [276] admissibility of the testimony. Now, you are not to think that there is anything that is being withheld, or that there is any particular motive in keeping things from the Jury. It is necessary under our rules of procedure sometimes for counsel and the Court to have conferences, and for—sometimes for the Jury to be excluded so that we can talk over some matter relative to the testimony. It has taken some little time, little more than I thought, and the next witness that will be called will take some considerable time in his testimony, and so it would be impossible to have his testimony now this evening, continue with it, so I think this is probably as good a time as any to recess, and I imagine that it may be past the bedtime of some of you anyway. During the evening recess, arrangements have been made by the Sheriff to house you at the hotel, and remember the previous admonition of the Court, that you are not to speak to anyone about the case, or you are not to separate or straggle away or get away from each other when you are going to and from the hotel, and when you go to your room in the hotel, stay in your room, and don't try to get out of your room and get down the hall, or away from the rest of the Jury. Don't read anything about the case, don't discuss the case among yourselves, or don't permit any person to speak to you about the case. There are no radios I presume in those rooms are there?

[277] THE SHERIFF: No, sir.

THE COURT: I believe that is all then Mr. Sheriff, and you will arrange to take this Jury to breakfast in the morning, and you will do that before you bring them up here. We will reconvene in the morning at nine o'clock, and you will have to get them up in time Mr. Sheriff to get their breakfast. Goodnight Gentlemen.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 426) Monday, July 18th, 1955, Regular July 1955 Term

Now at this time, it being time for evening recess, it is ordered by the Court that this cause be laid over to 9:00 A.M. July 19th 1955.

And thereafter to-wit: On the 19th day of July, 1955, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 428) Tuesday, July 19th, 1955, Regular July 1955 Term

Now on this day, comes again the said parties, Prosecuting Attorney of Cole County for the State, and the defendant in person and by his counsel Mark Murray Hennelly, and also comes again the jury herein impaneled and sworn to try this cause. [278] Whereupon trial is resumed and progresses in the hearing of the evidence herein.

JAMES CREIGHTON,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. Will you state your name please? A. James M. Creighton.

Q. Mr. Creighton, you were sworn last night before we recessed, weren't you? A. Yes, sir.

Q. Mr. Creighton, you are an inmate at the Missouri State Penitentiary, aren't you? A. That is right.

Q. What sentence are you serving? A. Life.

Q. Is that for homicide or murder? A. Yes, sir.

Q. When did you enter the Penitentiary? A. January 19, 1933.

Q. Will you speak loud enough for all the jurors to hear you? A. January 19, 1933.

Q. And you have been convicted of any other crimes? A. Yes, sir.

Q. What crimes is that? [279] A. Burglary and car theft.

Q. When was the, do you recall when the burglary was? A. 1922.

Q. 1922? A. Yes, sir.

Q. Where was that? A. In Frederick, Oklahoma.

Q. And what was the other one? A. Car theft.

Q. And when was that? A. Hughes County in Oklahoma, in 24.

Q. Now, on September 22nd, 1954, were you confined in the Missouri State Penitentiary? A. I was.

Q. And where were you confined? A. In B basement, Death Row.

Q. Now Creighton, I will ask you to turn here, to look at what has been identified as State's Exhibit No. 1, and take this ruler and indicate on that exhibit, if you can, where you were confined? A. I was here in 17, the end cell.

Q. Did you know an inmate by the name of Walter Lee Donnell? A. Yes, sir.

Q. Where was he in Death Row that night? A. 18, next door to me.

Q. You know an inmate by the name of Stidham? [280] A. I do.

Q. Is he in the Court Room today? A. Yes, sir.

Q. Will you point him out? A. Right over there.

Q. And what name do you know him by? A. Slick Stidham.

Q. Do you know an inmate by the name of Rollie Laster? A. Yes, sir.

Q. I will ask you if Stidham and Laster were in Death Row on the night of September 22nd? A. Yes, sir.

Q. Mr. Creighton, prior to the night of September 22nd, when did you start celling in Death Row? A. Well, I don't remember the exact date, but I think it was around May.

Q. Do you know when Stidham started celling in Death Row? A. No, I don't to be exact.

Q. Do you know about when?

MR. HENNELLY: Object, if Your Honor please, it would call for a conclusion and would be hearsay.

THE COURT: Well if he knows that he was there, and knows about when he was there, he may testify as to the approximation of the date.

Q. You may answer.

[281] THE COURT: Overruled.

Q. About when? A. About June, I imagine.

Q. Now Creighton, did you hear any, you know where Stidham was celling, what cell he was in? A. The best I could indicate, would be around on the other side of the bathroom. See, the bathroom, I could point out here on the chart, along about middleways, I don't know exactly here, or not, I can't see, it don't seem like I can read, but somewhere along in here though, the bathroom is, about middleways of the hall, I don't exactly know what cell.

Q. I will ask you if prior to September 22nd, you overheard any conversation between Stidham and Walter Lee Donnell? A. Yes, I heard conversation, cussing the kid and calling him every kind of a name.

MR. HENNELLY: Object to the latter section, not responsive, and for the reason it is wholly irrelevant and immaterial and don't tend to prove or disprove any issue in the case. The question was did he hear any conversation.

THE COURT: Yes, and the answer to that can just be yes or no. The objection will be sustained, but you

may answer the question yes or no, did you hear any conversation between—

A. Yes, sir.

Q. The Defendant Stidham, and Walter Lee Donnell? A. Yes, sir.

Q. Now your answer to that is what? [282] A. Yes, sir.

Q. All right. Now I will ask you to relate to the Jury what that conversation was?

MR. HENNELLY: Object, if Your Honor please, for the reason that that is totally irrelevant, immaterial to any point. The time and place has not been set, and for the reason that—

THE COURT: Well, I think you have gone far enough, I think the time and place— I presume he testified to where it was, but as to the time, I think you are proper in your objection to that, so the approximate or exact time should be fixed, prior to September 22nd, 1954, the conversation that you say you heard between Donnell and Stidham, was it before September 22nd?

A. You mean what transpired?

THE COURT: Was the conversation before September 22nd, was it in point of time, was it before September 22nd, when you heard this conversation that you testified you heard? A. Yes.

THE COURT: Now when?

A. Well now, as to the date, it was every day and night to just cuss him and ridicule him.

Q. How long a period of time, when was it, without telling what it was, when was it? A. From the date they got down there.

Q. Date who got down there? [283] A. Stidham and Laster.

Q. All right, you may proceed then with your questioning.

MR. RILEY: You can go ahead and tell the Jury just what you heard.

A. Well, I didn't know the kid.

Q. Who is the kid? A. Donnell, and they commenced calling him a bunch of rats and mother-fuckers.

Q. Who did that? A. Laster and Stidham.

MR. HENNELLY: Object in respect to Laster, and ask that that be stricken as hearsay and not binding on this defendant.

THE COURT: I believe I will sustain that objection at this time. Confine your testimony to the Defendant Stidham, and the objection will be sustained as to Laster, Gentlemen of the Jury, that part is stricken as to a person by the name of Laster.

Q. Creighton, just go ahead and tell what Stidham did and what he said. A. He said they ought to kill him over in E Hall when they broke out over there.

MR. HENNELLY: Object to that, and ask that it be stricken and the Jury instructed to disregard it, and a mistrial declared, for the reason it is an attempt to put the Defendant's reputation at issue, and totally irrelevant and immaterial and [284] not responsive.

THE COURT: Is this statement you have made something that the Defendant Stidham said?

A. Yes.

Q. To Walter Lee Donnell? A. That is right.

THE COURT: The objection is overruled. Now, let's proceed on the question and answer basis, so that the witness isn't given too free a reign in his testimony, because there may be parts of his statement that are not pertinent or material to the issues in the case. All right, you may proceed. The objection is overruled, and the request for the mistrial is denied.

Q. Mr. Creighton, did you ever hear the Defendant Stidham curse Donnell? A. Certainly.

Q. How often did he curse him? A. Why every day and night.

Q. Well, what do you mean by every day and night? A. Just ridiculed him when he had odd times, and hollered down there and cussed the kid.

Q. Now, how often did that occur, over what period of time did that occur? A. From the time he got down there to the night of the riot.

Q. Did you ever hear him threaten him in any way? [285] A. Certainly.

Q. What did he say? A. Said he was going to kill him if he ever got out or got to him.

Q. What else did he say? A. Why he said, when they come in here and get us out, we are going down there and kill them both.

MR. HENNELLY: Object now for the reason that these things, these questions should be more on point of time, rather than every day. I am going to object for the reason that the time has not been placed for this last statement.

THE COURT: Well, fix the time Mr. Prosecutor of this last statement.

Q. Creighton, during the period of time, beginning with the time that Stidham moved into Death Row, did you have an opportunity—and up to September 22nd, did you ever hear Stidham say that he was going to kill Donnell?

MR. HENNELLY: Object again, if Your Honor please, for the reason that does not sufficiently fix the time to the degree of particularity with which this witness could be cross-examined on. I think it is too broad, indefinite and speculative, and gives this witness a roving commission. It goes from June I think, or May, until September 22nd.

MR. RILEY: If the Court please, anytime prior to the night of September 22nd, is material.

[286] THE COURT: That is right. I have ruled on that, that he may testify as to what conversations took place, or what statements were made by the defendant from the date in June, which he estimates as the time that the Defendant came in that section of the prison, up until, or before September 22nd. Now, I gathered from one piece of the testimony here that this witness has testified to a statement that took place on the 22nd, and I asked the State to approximate the time of the last statement, and not—I think we had better go back in the record Mr. Ehlers, to the next to the last question, and answer of this witness.

THE REPORTER: Q. What else did he say? A. Why he said when they come in here and get us out, we are going down there and kill them both.

THE COURT: Now, that is the statement that I want the State to fix the time on, where the Defendant said, I am going to kill you if I ever get out to you, when was that statement made? A. Well, that was made Judge, oh, from the time he got down there, every day and he ridiculed him and was calling him everything in the world.

Q. Now Creighton, lets go to the evening of September 22nd, 1954, did you hear any statements on that, did you hear a commotion there that night? A. What do you mean?

[287] Q. Anything unusual? A. What do you mean commotion?

Q. Inside of the Penitentiary? A. Well, yes, are you talking about the riot?

Q. Well, I am asking you, did you hear anything or see anything unusual? A. I want to know what I should say, I don't want him objecting all the time.

Q. Well, did you hear or see anything unusual on the night of September 22nd? A. On the night of Septem-

ber 22nd, I noticed a fire out there in the stockade and lighting the place up.

Q. Now, about what time did you notice that? A. Now Mr. Riley, I didn't have no watch and I didn't know exactly what time, but I imagine it was around six or six-thirty or somewhere in that neighborhood.

Q. Now, did you overhear any conversation between Stidham and Donnell after you saw the fire? A. Well, yes, he was going to come down and kill him and I both when he got out, soon as they got out down there to him.

Q. Did you hear any conversation, who was? A. Stidham.

Q. Did you hear any conversation between Stidham and anyone else? [288] A. Laster, yes.

Q. And what was that? A. Well, about coming down there, and as soon as we get out, and hollering up to the door.

MR. HENNELLY: Object to that, too vague, indefinite and speculative, doesn't fix who made the statements.

THE COURT: Who made the statement? A. Stidham and Laster was both hollering.

MR. HENNELLY: With respect to Laster's statements, I ask that that be stricken.

THE COURT: This is on the 22nd? A. Yes, sir.

Q. Did you hear any conversation between Stidham and you know DeLapp? A. Certainly.

Q. What name does he go by? A. Curley.

Q. Now, did you hear any conversation between Stidham and DeLapp? A. Well, hollering back and forth from the door.

Q. Will you tell this Jury just what you remember hearing? A. Well, first that I heard was kind of a lull that he hollered where are you at, old man.

Q. Who said that? A. Slick Stidham said who is that, and he said it is Curley, [289] and DeLapp, and he

said we are coming after you, and so I don't know, maybe two or three minutes they worked and then they stopped working, and he hollered, said, well we can't get to you, and he said, well, he commenced to begging and hollering and all, and got hysterical and panicky and was hollering for them to come on down and get him, and come around there to the window.

Q. Who was hollering for them to come on down? A. Stidham was.

Q. And do you know where DeLapp was at that time? A. Well, he was out the front door I guess. They was out there hammering, and they hadn't gotten into the cage, I know at that time.

Q. Did you overhear any other conversation with Stidham and DeLapp, when DeLapp was at any other place? A. Well, they had several conversations, but some of it I couldn't hear and some of it I could hear.

Q. Just what you heard. A. Well, he talked about the men going back up and starting to work again, and coming—

THE COURT: Who talked to who?

A. Stidham talked DeLapp into going back to go to work and let them guys go to work, and so they finally broke into the cellblock.

Q. Now, prior to that, do you recall whether or not Stidham [290] was talking to anybody at the windows of B basement? A. DeLapp come around to the window, that is when he talked the men into going back and working on the door.

Q. Who talked him into going back and working? A. Stidham. Well, Laster, he helped too.

Q. Now, during this time, did you overhear any conversation between Stidham and Donnell? A. Well, he was hollering down there, we'll be down to get you two old dogs as soon as we get out.

Q. What did he say he was going to do to you? A. Kill us.

Q. Did he say why he wanted to kill him? A. Why he was supposed to have gone to the Grand Jury or took the stand.

MR. HENNELLY: Object to the form of that answer, for the reason it is a conclusion and it is too vague, indefinite and uncertain.

THE COURT: Yes, it should be the statement, the question was, that was asked, did the defendant Stidham say why. Now don't give your opinion of why, of what the why was, you may tell what he said, if anything.

A. Well, he said he was coming down to kill us both, Donnell and I.

Q. But did the Defendant Stidham say why he was going to kill Donnell? [291] A. Well, he said that all the time up to the night of the riot.

MR. HENNELLY: Object to it for the reason it is not responsive, and ask that the answer be stricken.

THE COURT: The statement hasn't been made and the objection is overruled. Mr. Creighton, the State, the thing that the Prosecuting Attorney is asking you is what the statement was, he is asking you first did he say why, and then what was that statement, that is what he wants. A. Because he went before the Grand Jury.

Q. Now, what was the statement, what did he say, what was the actual words used? A. Well, he said, you took the stand against Thompson and them in St. Louis before the Grand Jury.

MR. RILEY: Now Creighton, did you ever see Stidham out of his cell?

A. Did I ever see him out of his cell?

Q. Yes, that night? A. Yes.

Q. All right, where was he? A. In front of my door.

Q. And who was with him? A. Well, Hoover, DeLapp, and Kenton and Vidauri, and Laster and Noble.

Q. Mr. Creighton, I show you what has been marked as Exhibit 7, [292] do you know what that is? A. Well, that is inside of the cage.

Q. Now, do you see any lights on that picture? A. Yes, up here in the ceiling.

Q. All right. Do you know what happened to those lights? A. Yes, sir, DeLapp crawled up on these bars here and knocked them out with a club through the bars.

Q. Now, where was Stidham when he did that? A. He was up the, run up here somewhere.

Q. And then you say these seven men were down in front of your cell? A. Yes.

Q. Now, all right, what happened there? A. Well, DeLapp, when he knocked all these lights out, he run them all outside of the cage here.

Q. Run who out? A. Sir?

Q. Who did he run? A. The convicts, you know how they gang up, get curious, and all gang up down there.

Q. Now, did he run these seven, Vidauri, Hoover, Noble— A. No, they came on down inside. They came on down and joined them in the cage and came on down to our cells.

Q. Who came down to your cell? A. Well, Stidham and Laster and Noble and Kenton and Vidauri and Stidham.

[293] Q. Hoover there? A. Yes, sir, Hoover.

Q. DeLapp? A. Yes, sir, DeLapp.

Q. What happened there? A. Well, they tried to get my door open.

Q. Now, just how did they try to get into your door? A. Well, when they walked up, Stidham walked up kind of silent Joe in front of the door, and stood there, and Kenton commenced trying to unlock the door.

Q. Who had the key? A. Kenton.

Q. Was Stidham there? A. Yes, and Laster.

Q. What did Stidham say? A. He said, I am going to settle the score with you two old dogs.

Q. Now, who was the two old dogs? A. Donnell and I.

Q. Tell what else happened there? A. Well, they fooled around with the door a little bit and finally one of them got me in the mouth, and I got ahold of the club and took it away and jabbed them off the lock.

Q. What were you jabbing with? A. Looked like the back of one of them long green chairs we got up there.

[294] Q. About how long was it? A. Well, must have been that long.

Q. Are you indicating about three or three and a half feet? A. Something like that.

Q. Now, I will show you what has been marked as State's Exhibit No. 9, and ask you if you saw that or a similar instrument? A. Well, they used something similar to that, a large hammer to knock that screen down to try to reach around out of my way to where I couldn't punch them.

Q. I will show you what has been marked as Exhibit No. 10, do you know what that is? A. Yes, sir. Here is what I was trying to say about this screen.

Q. Do you know what that is a picture of? A. Yes, sir, this is the outside of the cage and the cell, whatever you want to call that.

Q. Going back to the sledge hammer, who had the sledge hammer? A. Well, Noble had it at the time.

Q. What did he do with it? A. He beat this screen down see, to—so he could reach around so I could not reach in here. See, I am in this cell, and they put the key in the lock and tried to unlock it see, and he couldn't get his key

in there, and so they went on over to Donnell's cell and unlocked it.

Q. Now, just a minute. Did you see Noble do anything else with [295] that sledge hammer? A. Yes, I seen him hitting at Donnell's foot—

Q. And where was Donnell's foot? A. In the back of the door.

Q. Well, you couldn't see that could you? A. No, I couldn't see that, but I could tell from the way he was hitting, what he was trying to do.

MR. HENNELLY: Object to that as being a conclusion and ask that it be stricken and the Jury instructed to disregard it and a mistrial declared therefor.

THE COURT: Sustained, and the answer may be stricken, but the request is denied.

Q. What could you see him doing? A. Swinging a sledge hammer.

Q. What did he say? A. I heard him telling him to get your foot back you sonofabitch.

Q. Were you injured there Creighton? A. They broke my jaw in two places, and busted my—

Q. Who broke your jaw, how did your jaw get broken sir? A. How?

Q. How did your jaw get broken? A. They punched me with that pole and that is when I got the pole away from them.

Q. Who was doing the punching? [296] A. Hoover.

Q. Now, after you got the pole away from them, what did you do with it? A. I turned it around and punched them.

Q. And was Stidham there? A. Certainly he was. He wasn't there to where I could get to him, he backed off.

Q. Did they try to open your door with a key? A. Certainly.

Q. Why couldn't they open it?

MR. HENNELLY: Object if Your Honor please.

THE COURT: Yes, that calls for a conclusion.

Q. Did you do anything to the lock in your cell? A. Certainly.

Q. What did you do? A. I put concrete in there and my comb and stuffed it all full of junk as I could so they couldn't get the key in it.

Q. Well, while they were doing that, did you hear this defendant say anything to Donnell? A. Well, they was all cussing and telling me they would be over to get me next.

MR. HENNELLY: Object to that, not responsive, too vague and indefinite.

THE COURT: He asked you if you heard the Defendant James Stidham, say anything to Donnell?

[297] A. Certainly, said he would be over to get him next.

Q. Now, what did you see next? A. Well, when they all, when they got the door open, they all went in that cell.

Q. All right, now did you see them go in? A. You can't see them go in the door, you could see them go up to the door, seven of them, you can't see, there ain't no way you can see a man go in that door, you can see him leave there, but you can't get around that screen without you seeing him, see. There is no way that you can walk around this screen here, but there was seven of them all went in there. At least they got out of sight. I don't think there was any way they could get up there.

MR. HENNELLY: Object to that last section, and ask that it be stricken, and the Jury instructed to disregard it, and a mistrial declared.

THE COURT: The statement, they got out of sight, may stay in the record. The balance of the witness' answer may be stricken from the record, and the Jury in-

structed to disregard it. The request for a mistrial is denied.

Q. Creighton, who went up to that door? A. Well, Stidham, and Kenton and Laster and Noble and Hoover, and Vidauri.

Q. DeLapp there? A. Sure.

[298] Q. And what did you hear then? A. Well, I heard this kid hollering, I ain't no rat, I ain't no snitch.

Q. Now, this kid, who is this kid? A. Donnell.

Q. What did he say? A. He said, I ain't no snitch, I ain't never harmed you boys, and begging them, and pretty soon he was going oh, oh, and he hollered real loud, and then he got kind of gurgling, and you know how a man—

Q. You just tell this jury what you heard. A. Well, I just told you what I heard.

Q. Then what happened,— A. Well, they all run out of there like a bunch of rats..

MR. HENNELLY: Object to that, and ask that it be stricken and the Jury instructed to disregard it, and a mistrial declared.

THE COURT: The objection will be sustained and the answer may be stricken. We are not interested in your conclusions.

A. Well—

THE COURT: He asked you what they did, and you can tell that without telling your conclusion. Now Gentlemen of the Jury, you disregard the last statement. The request for a mistrial is denied. The last question was, what did you see them do?

A. Well, see Judge, I could see them go around this screen, I seen them all run out of there and go up the walk.

[299] Q. Is that the last you saw of them that night? A. Yes, sir.

Q. Now, was there any lights down there? A. Well, there was light from the stockade and the building burning out there, and them white walls, tile, it just lit the place up like a country church.

Q. Now, was there buildings burning in back? A. Well, the chapel was burning and the shops out in the stockade, what we call the shops.

Q. Show, if you can, the direction of the chapel that was burning. A. Well, the chapel was down there on the end, and out here in the stockade and in front of the cell is where the buildings were.

Q. Now, who is the next person you saw? A. Well, the next person I saw, I guess was Mr. Barton, the Highway Patrolman.

Q. Do you have any idea Creighton, how long after these seven were down there that it was before Barton came in? A. No, it seemed like an awful long time, but I wouldn't estimate it.

Q. Were you still locked in your cell? A. Yes, sir.

Q. And was that Lieutenant Barton? A. Yes, sir.

[300] Q. The Highway Patrolman? A. Yes, sir.

Q. Now Creighton, during the whole time of the evening on September 22nd, was there any shooting in Death Row, or B basement? A. None whatsoever.

MR. HENNELLY: Object to that for the reason your Honor that would be a conclusion on the witness' part.

THE COURT: Sustained as to the form which the question was asked. This witness may answer if he heard any shots.

Q. Creighton, did you hear any shots fired in Death Row? A. No.

Q. Did you hear any bullets flying around? A. No.

Q. I believe that is all.

Cross-Examination by Mr. Hennelly

Q. Mr. Creighton, at any time prior to today, has there been any offer made of any kind to you by the prison authorities or by the Prosecuting Attorney, with respect to a parole of any kind? A. None whatsoever.

Q. Never been any talk about that at all? A. No.

Q. And you are up here testifying and you have never even [301] discussed with them anything about anyone doing anything for you, for your testimony, is that right? A. That is right.

Q. Now, is everything else you have testified here just as true as that? A. That is right.

MR. RILEY: If the Court please, I object to the form of that question, and arguing with the witness.

THE COURT: Sustained.

MR. RILEY: And I ask that counsel be reprimanded.

THE COURT: Well, the objection is sustained to the question, and the question and answer are both stricken.

Q. Very well. Now then, when did you say you got into Death Row Mr. Creighton? A. Sometime in May, I don't know the exact date.

Q. Where had you been just prior to the time that you got into Death Row? A. I had come back from Fulton, or they brought me back.

Q. Fulton Hospital? A. Yes, sir.

Q. And how long had you been in Fulton? A. Well, I don't know, to be exact, something like five or six weeks.

Q. Five or six weeks? A. Yes, sir.

Q. Now, had you gone up to Fulton after you had slashed— [302] A. I didn't go up there, they took me up there.

Q. Well, did they take you up to Fulton after you had slashed an inmate's face with a knife? A. About eighteen or nineteen months later.

Q. I see. And I am going to ask you, did you ever attempt to commit suicide? A. Well, I put on a pretty good act to go to Fulton. Now will you let me tell you why I went to Fulton?

Q. No, just answer the questions. Did you attempt to commit suicide? A. Well, I don't know whether you would call it an attempt, I put on a pretty good act, I done about everything I could.

Q. You put on a pretty good act, you done everything a man could conceive of doing to get out of the Penitentiary, is that right? A. No, sir, wasn't trying to get out of the Penitentiary.

Q. Trying to get to Fulton? A. I was there for thirty days trying to get on the yard.

Q. And you would have done almost anything to do that, wouldn't you? A. No, I wouldn't have done almost anything.

Q. Now, let me ask you this, did you at anytime while you were there, did you go to the toilet in your hand and wipe that on your face? A. No.

[303] MR. RILEY: If the Court please, that is highly objectionable and doesn't prove or disprove anything in this case.

THE COURT: Well, the question was asked and the answer is already in.

A. No.

MR. HENNELLY: May I make a statement to the Court outside of the hearing of the Jury?

THE COURT: I am—well, let me ask you this, come up here. (Out of the hearing of the Jury) This last question and the answer are already in the record, and they may stand, but do you propose to pursue this matter further?

MR. HENNELLY: Your Honor, I think that having raised the question of this man's competency and his san-

ity, that I am going to certainly ask the Court to make it a Jury question. I am submitting it to the Jury as a Jury question, and I am going to submit an instruction to the Court on that matter, and I intend, and that was the reason I had pursued it.

THE COURT: The Jury are the judges of the credibility of the witnesses, but not of the competency to testify. As I understand it, it is the Court's prerogative to pass upon whether or not a witness can be permitted to testify, and there has been no showing up to this point, of any statutory incompetency of the witness. One statutory incompetency for instance is age, and another may be insanity, and there has been no showing of any insanity of this witness. In fact, [304] the Court, out of the hearing of the Jury last evening had this witness on the stand and observed his manner and his demeanor on the stand, and his manner in which he answered questions, and the way in which he conducted himself, the apparent ability of the witness to know about or to recollect incidents about which he was asked, and therefore the Court determined from the testimony that was offered, and also from the observation of the witness himself, and in hearing his answers to questions asked him by the Court, came to the conclusion that the witness was not an incompetent witness. Now, that has been passed upon by the Court. Now then, you would be entitled of course to cross-examine this witness on any matters relative to his credibility. For instance, the State has already asked him whether he has been convicted of previous convictions and that goes to the credibility of the witness. I think you should have some leeway in—you have shown already here by these questions that he was sent over to the hospital, Hospital No. 1 at Fulton.

Q. I won't pursue it further Your Honor.

THE COURT: Well, all right.

Q. Now then Mr. Creighton, on the night in question, you had been in Death Row for approximately how long on the night of September 22nd? How long had you been in Death Row? A. Since May I told you.

Q. Since May? A. Yes, sir.

[305] MR. RILEY: You will have to speak louder, I didn't hear you.

A. Since May.

Q. Every day and every night during that time, you heard the Defendant making these remarks that you have indicated to the Jury, to Donnell, is that right? A. That is right.

Q. Can you indicate on State's Exhibit 1, where Stidham's cell was? A. What is this?

Q. I am sorry Mr. Creighton, that is the plat in back of you there. A. Oh, it wasn't so far up here, about middle ways.

Q. About middle ways? A. Yes, you can hear your voice that far easy, when you are talking.

Q. He hollered at him down there did he? A. Yes, sir, that is right.

Q. Was Mr. Stidham's cell on this side, and I am now indicating on State's Exhibit 1, toward the Gate No. 3, was it toward Gate No. 3, or was it on the other side of the shower room? A. Well, maybe you can see it better if you will show me where the bathroom is, maybe I can indicate better to you.

Q. Let me ask you this, don't you see very well Mr. Creighton? A. Well, I could see well enough, but that fine writing, and this far from it.

[306] Q. Is it pretty hard for you to make things out? A. It is there, yes.

Q. All right. Now, let me ask you this Mr. Creighton, on the night in question, which was September 22nd, was the first thing that you saw the fire burning, or was the

first thing that aroused your attention, some noise of some kind?

THE COURT: By burning, you mean a fire—

Q. I am sorry, I think the Court is correct. A. I saw the fires burning Judge.

Q. What was the first thing that aroused your attention as being unusual that night?

THE COURT: The fires or the noise?

A. The fire out in the stockade and the convicts running is the first thing.

Q. Had you heard that pounding or that noise in B basement before the time that you saw the fire? A. No.

Q. And how much time after you saw the fire did you hear that noise, that pounding? A. Well now, I wouldn't estimate it, but it wasn't long. I wouldn't estimate it.

Q. A half hour? A. Something like that.

Q. All right. Now, incidentally, were the windows open that night? A. Yes, sir.

[307] Q. All of the windows were open, is that right? A. Yes.

Q. All right. Now then, you knew Shaky didn't you, Captain Dietzel? A. The guard that was on duty?

Q. Yes. A. Yes, sir.

Q. Had he made his second round that night when you first heard that noise? A. Second round? I don't know if they make any special rounds.

Q. You don't recall, do you recall seeing him at all that night? A. Yes, he brought the paper down.

Q. Brought the paper down? A. Yes, sir, after supper.

Q. All right. Now during that time, during the time that you heard this noise, is it your testimony that they continued to holler back there, is it your testimony that Stidham continued to holler down at Donnell? A. Not continuously, no, not for all that noise was going on, and he was hollering to the other fellows then.

Q. All right. Did he holler at him anytime that night? A. At who?

Q. At Donnell, did Stidham holler at Donnell at anytime that night? [308] A. Yes, sir. He said, I will be down and get you, you son-of-a-bitch.

Q. Be down to get you, you son-of-a-bitch? A. Yes, sir.

Q. Was he referring to you, or was he referring to Donnell? A. He was referring to Donnell and I both, both of us.

Q. You both accepted that, is that right? A. Yes, sir.

Q. Now then, I am going to ask you, you made some reference to some talk about appearing before a Grand Jury in the Thompson matter at St. Louis. When was the first time you heard Thompson's name mentioned by anybody in Death Row? A. Well, it was the first day they moved down in B basement.

Q. The first day they moved down? A. Yes, sir.

Q. So that if we understand your testimony correctly Mr. Creighton, this thing happened every day and every night, this hollering at Donnell? A. Certainly, whenever he would go out for a bath or shave or anything else.

Q. Now, how often would you get out of there for a bath and a shave? A. I don't know, to be exact, but I guess you would say fifteen minutes for a shave and haircut.

Q. Where would you go, into that shower room? [309] A. To bathe, yes.

Q. And would more than one of you get out at a time? A. No, just one at a time.

Q. Just one at a time? A. Yes, sir.

Q. When you came out, in order to go to the shower, was there a guard there with you, or did somebody let

you out and you could run around there by yourself? A. No, a guard would come down there and take you out.

Q. A guard came down? A. Yes.

Q. And once one was in Death Row—strike that. Did you, as an inmate of Death Row at anytime from May of 1954, until September 22nd, 1954, get outside of that gate, or were you always in the cage generally? A. They would take you outside of that gate to shave you and cut your hair.

Q. Now, where was that that you would go to get a shave and get your hair cut? A. Right up here in the front.

Q. And was there, that would be one at a time, is that right? A. Yes.

Q. And now can you tell us how often you would get out in order to take a shower in that shower room? A. Once a week.

[310] Q. Once a week? A. Yes.

Q. Now then, after these men had been pounding and after you heard these conversations between Stidham and Donnell, about how much time elapsed, if you know Mr. Creighton, from the time you heard the first pounding, until those men got through? A. Well, I wouldn't estimate the exact time. Under those circumstances, you don't remember every little detail, and I had no time piece, and no way of telling exactly.

Q. Was it dark yet when they got through? When they broke through? A. Yes, it was getting dark.

Q. Just getting dark? A. Yes.

Q. And can you give this Court and Jury any idea of the amount of time, was it two hours or three hours later? A. Well, no, I wouldn't say it was three hours.

Q. Sir? A. Might have been an hour and a half or two hours.

Q. Hour and a half or two hours? A. Yes, something like that.

Q. Now, who was the first person—strike that. Let me ask you this. How wide are those cells, if you know? A. I don't know.

Q. All right. You know how deep they are? [311] A. Well, I imagine about eight or nine foot.

Q. Eight or nine feet deep? A. Yes.

Q. And I am going to ask you, this screen, is there a screen up along the side of each one of those cells? A. In between each cell, yes.

Q. All right. Now, on the night in question, which was September 22nd, who was the first person that you saw among the group that broke in? A. The first person that I saw?

Q. Yes. A. DeLapp I guess.

Q. DeLapp? A. Yes.

Q. Now, can you, did you hear them break in, did you hear the original break through that door, that gate 3 there? A. They broke through three doors.

Q. Sir? A. They broke through three doors.

Q. Well, the last door, the door which permitted them to get down into Death Row, do you recall now whether or not you heard that final break through there? A. No.

Q. I see. And I will ask you, when you saw DeLapp, who was with DeLapp at that ime? A. He was up knocking these lights out by himself.

Q. He was by himself knocking the lights out? A. Yes, sir.

Q. Did he have a stick of some kind? [312] A. Yes, sir, a club.

Q. And was he up on the ceiling, or how was he doing that sir? A. No, he come up on the bars on the outside and was reaching in through the bars and knocking the lights out.

Q. Did he knock out all the lights? A. Yes, sir, all of them.

Q. Now, I will ask you sir, with respect to your cell, was there a light in your cell? A. No, I turned mine out.

Q. Now, tell the Court and Jury how you turned that light out? A. I had a piece of pasteboard and a magazine all rolled up, and I just twisted it.

Q. I will ask you if the light was on in Donnell's cell? A. He said it wasn't, I don't know. He threw his shoe at it. He said that was the only way he could get it out.

Q. Was you in such a position that you couldn't see whether or not there was any light coming out of cell 18? A. Well, I didn't see none. I could see his light was out, but I didn't see it shine out on the wall.

Q. Let me ask you, do you know of your own knowledge whether the light was out or on in cell 18, which was Donnell's cell? A. It was out.

Q. It was out? A. Yes, sir.

Q. So that at least at this time your light was out, the light [313] in Donnell's cell was out, and DeLapp had knocked out the rest of them himself, is that correct? A. That is right.

Q. Now then, with respect to the cell right next to you on the other side, which would have been— A. There was no cell on the other side of me.

Q. Well, not on the other side of your cell, but on the other side of Donnell's cell, do you know who was in that cell? A. Nobody in that cell.

Q. That cell was empty? A. Yes, sir.

Q. All right. Now, aside from the lights, from the light that came from the fires, after Delapp got in, and he had knocked out all the lights around there, there wasn't any light on? A. There was one on the end, there was a light on the end, it was burning, he couldn't reach that. It was outside of the cage, see this is the cage, see this is the

walkway around the cage, and it goes half way there and there is a partition to keep them from going all the way around the cell block, and right in here, there is a light up at the corner.

Q. Now, that light was on? A. That light was on.

Q. Now, as DeLapp was knocking out those lights, did you see Stidham? [314] A. Not at that time, no.

Q. How much time, after you saw DeLapp knocking those lights out, was it until you saw Stidham? A. I guess about ten or fifteen minutes.

Q. Ten or fifteen minutes? A. Yes.

Q. And when you saw, during those ten or fifteen minutes, were there a lot of convicts milling up and down there? A. There had been, wasn't then, no. He run them all out as he went up knocking them lights out.

MR. RILEY: Who run them all out? A. DeLapp.

MR. HENNELLY: DeLapp? A. DeLapp.

Q. Now, let me ask you this, can you give the Court and Jury any idea of about the number of men that were milling back there? A. Well, there must have been maybe a hundred or a hundred and fifty.

Q. A hundred or a hundred and fifty? A. Yes, sir, there was a crowd in there.

Q. And they were, did they have weapons with them? A. No, they was on the outside of the cage, they wasn't on the inside of the cage.

Q. Did they have, any of them have any knives or sticks or brickbats or anything like that? [315] A. Oh, some did, yes.

Q. Some of them did? A. Walking along knocking the windows out and stuff like that, and breaking them.

Q. Now, you say that about fifteen, or ten or fifteen minutes after DeLapp knocked the lights out, that is when you saw Stidham, is that right? A. Yes.

Q. Now, when you saw Stidham, where was he at the first time you saw him? A. Walking up in front of my door.

Q. Had you had any conversation with Stidham from the time DeLapp started to knock those lights out? I mean until you saw him those ten or fifteen minutes later? A. Had I had any conversation?

Q. Yes, did he say anything to you? A. In this fifteen minutes?

Q. Yes. A. He hadn't said nothing to me.

Q. You didn't see him? A. Not until he walked up in front of my door.

Q. You said in ten or fifteen minutes, is that right? A. No, sir.

Q. Now, when he walked up in front of your door, who was with him then? A. Kenton, Hoover, DeLapp, and Noble, Vidauri and Laster.

Q. And you could recognize all of them, could you? [316] A. Yes, sir, the light was there, they was between me and the light.

Q. They didn't have anything on them to keep you from trying to recognize them, did they? A. No.

Q. I see. And what happened when they came up to your cell? A. When they came up, they were there cussing and ridiculing us, and calling us sons-of-bitches.

Q. Were some of them calling you stool pidgeons and a snitch? A. No, they called us old dogs.

Q. Old Dogs? A. Yes, sir.

Q. And is it your testimony Mr. Creighton that one of them had a stick of some kind? A. Hoover did.

Q. Now, Hoover had a stick I think you indicated, according to the record, to be three or three and a half feet long, is that right? A. Yes, sir.

Q. Now, did he reach in at you with that? A. No, he punched it through the bars like that.

Q. Now, did you jump back at that time? A. I automatically throwed my hands up and when I did, he pushed the stick inside of the cell and I grabbed it.

Q. Now, did you go to the back of the cell at that time? A. No.

[317] Q. Did you come right up to the front part of the cell with those seven men there indicating they wanted to get at you? A. Certainly.

Q. You didn't go in the back and stay in safety in the back of the cell? A. No, I didn't.

Q. Your light was out by that time? A. Yes.

Q. All right. Now, what did Stidham say to you at that time? A. He stood up there and made some remark about your time is coming or something.

Q. Now, how long did those men stand at your cell? A. Now, you are getting ahead of yourself. You asked me about the stick now.

Q. Now, please just answer my question. A. They got away as soon as I got the stick.

Q. Just answer my question.

MR. RILEY: He said they got away from there as soon as he got the stick.

Q. All right. Now, which way did they go then? A. Over to Donnell's cell.

Q. Now then, had you been hit in the jaw yet at that time? A. No.

Q. And who was the one that hit you? A. Hoover.

[318] Q. Broke your jaw? A. Yes.

Q. And knocked you down? A. No, didn't knock me down.

Q. How many licks did they get at you Mr. Creighton? A. Only one lick, only one lick punched me.

Q. But that didn't knock you down and that didn't cause you to go in the back of the cell, you came up right near the front? A. It didn't knock me out, I know that.

Q. All right. Now, after that little incident, after they had hollered at you and reached in with the stick, and one of them punched you in the head— A. They punched through the bars.

Q. Punched through the bars, all right, I believe your testimony is that they knocked down that screen which is indicated on State's Exhibit 10, is that right? A. See this screen here?

Q. Yes. A. They ripped that down so they could reach around here and get to this lock.

Q. All right. Now then, did they then proceed directly over to Donnell's cell? A. Soon as I kept punching out through here, over this way, and they seen they couldn't get my door unlocked, and me with that club.

[319] Q. They then went immediately over to Donnell's cell, is that right? A. Yes, sir.

Q. Now, after they got over to Donnell's cell, tell the Court and Jury again what happened Mr. Creighton? A. Well, they opened, they tried to open his door and unlock it, and was standing there hitting at his foot and telling him to get his foot back you son-of-a-bitch.

Q. Who said that? A. Noble.

Q. Noble made these remarks to him? A. Yes, sir, and was swinging that sledge.

Q. And swinging that sledge hammer? A. Yes, sir.

Q. That was Noble, is that right? A. Yes, sir.

Q. And then did they get inside of Donnell's cell? A. Yes, sir.

Q. Now, at that time the lights were out in your cell and the light was out in Donnell's cell, is that right? A. Yes, sir.

Q. Now, how long would you say it was before you heard this remark, "I ain't no snitch", and those matters that you referred to the Court? A. Just as soon as I heard the door go back and they walked in [320] there.

Q. Would you say immediately he said, "I ain't no snitch"? A. Yes, sir.

Q. And was it just a matter of seconds until you heard this oh, oh, that you referred to? A. Yes, sir, about a matter of seconds.

Q. Matter of seconds? A. Yes, sir.

Q. And then you saw all these men run out? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now, you didn't see who killed Donnell, did you? A. No, I couldn't see it through this wall.

Q. Is it your testimony that the next person you saw was Lieutenant Barton? A. After they left, yes.

Q. When you saw Lieutenant Barton, was the light on in your cell then? A. No.

Q. Still out? A. Was when I left, yes.

Q. All right. Now, did Lieutenant Barton come down with a flashlight? A. Yes.

Q. And was there any water around there? A. Yes.

[321] Q. How deep was the water, if you know sir? A. Oh, I don't know how deep it was. It was all over the floor.

Q. All right. And did he shine the, did Lieutenant Barton shine the light in your face into your cell? A. Yes.

Q. All right. Was there anybody with Lieutenant Barton at that time? A. Oh, there was several guards and several Highway Patrolmen that I didn't know.

Q. About how many of them were there, would you say, would you say there was seven or eight people there together? A. There might have been twenty.

Q. Might have been twenty of them that came down, is that right? A. They was all crowded all the way out and all the way to the hospital.

THE COURT: He is talking about in front of the cell.

A. Well, Lieutenant Barton and several Patrolmen and the guards were outside of the cell.

Q. Mr. Creighton, do you recall testifying in the Laster trial in Jefferson City? A. Yes, sir, oh, yes, sir.

Q. I am going to ask you if certain questions were asked you and certain answers given by you in that trial. Was there some [322] lawyers asking you some questions there when you were testifying for the State up there then? A. Yes.

Q. I am going to ask you if these questions were asked you and this answer given. Questions by Mr. Riley: "Q. After this bunch left Donnell's cell, what happened then? A. Well, they went up to the front and stayed around a while and finally a couple came back to see if he was dead." Do you recall that question being asked you and that answer given in the Laster trial? A. That was a prisoner, yes.

Q. So, as a matter of fact, some people did come back then before Lieutenant Barton got there, is that right? A. Yes, before, yes, before Barton and the guards got down there, yes.

Q. So that when you said nobody had come back, you were mistaken about that, were you? A. Well, I just left that part out.

Q. You just left that out? A. Yes. There was a lot of time lapsed.

Q. Now, how much time would you say elapsed from the time those lights went out until Hoover punched you in the head? A. Well, it wasn't over fifteen minutes.

Q. I am going to ask you, I am going to ask you if you recall testifying—

[323] MR. RILEY: I don't know what this is here.

THE COURT: Come up here gentlemen. (Out of the hearing of the Jury)

MR. RILEY: I don't know what this is here, this transcript that he is now reading from, but unless he has the Court Reporter here who took it, to prove that it is correct, I am going to object to it.

MR. HENNELLY: I have here an official authenticated transcript of this witness' testimony in the case in Kansas City, in the DeLapp case, and I am going to ask this witness whether certain questions were asked him in the DeLapp case, and certain answers given by him.

MR. RILEY: It isn't a part of a bill of exceptions which has been approved in the regular manner. Now, I don't know what is in there. Before it could be competent, it would have to be approved by the respective attorneys and the trial Court or have the Court Reporter here to testify.

THE COURT: Well, of course, now the testimony of any person in a trial may be used for the purpose of impeachment, even if there wasn't a transcript of the trial made for appeal. Of course if the witness denied making the statement, it then is incumbent on the Defendant to produce someone to identify a transcript.

MR. HENNELLY: That is the answer.

MR. RILEY: All right.

[324] THE COURT: I think counsel has to be in good faith, I mean they can't just pick up something out of nowhere and pretend they are reading, and I presume from the transcript here, it shows a certification on the back of this, that this was a transcript of the testimony.

MR. HENNELLY: I certainly wouldn't do that, under any stretch of imagination.

THE COURT: All right, you may proceed.

Q. I am going to ask you if you recall testifying in the DeLapp case at Kansas City? A. Yes.

Q. On June 7th and 8th of this year? A. That is right.

Q. I will ask you if you recall certain questions being asked you by lawyers in Kansas City, and certain answers being given by you? A. Sure.

Q. Is that right? A. Sure.

Q. Now, I will ask you if this question was asked you and this answer given, "Q. Hoover,— I am sorry, how long after the lights were out did Hoover come up and punch you? A. Well it must have been thirty minutes I guess, things like that, you just don't—", and then there are some statements by counsel. "Q. About thirty minutes? A. You don't remember the exact time when things like that happen. Q. In your best [325] estimate, it was thirty minutes after the lights were knocked out that Hoover came up and punched you? A. Yes, sir." Were those questions asked you and those answers given in the DeLapp case? A. That is right.

MR. RILEY: May I see that?

MR. HENNELLY: Yes.

Q. I am going to ask you if you recall any colored fellow and a white fellow coming down after those men had tried to get at you, some half hour later, come down with a flashlight to your cell? A. I said that is the two that came down to see if Donnell was dead.

Q. Did they have a flashlight with them? A. Yes, sir.

Q. Had a flashlight? A. Yes.

Q. Now then Mr. Creighton, when was the first time you were convicted of a crime, in what year? A. 1922.

Q. 1922? A. Yes, sir.

Q. What were you convicted of then? A. Car theft.

Q. How old were you then sir? A. About seventeen.

[326] Q. Sir? A. Seventeen I think.

Q. Were you convicted in Oklahoma of burglary second degree and given two years? A. That is right.

Q. And then you were convicted of larceny of a motor vehicle were you, and given five years, is that right? A. That is right.

Q. Now, were you convicted of robbery, I am sorry, I withdraw that Your Honor.

MR. RILEY: Now, if the Court please, I object to him asking if he was convicted of some crime, unless he is prepared to prove it. He asked a question for a yes or no answer, and then withdraws the question.

MR. HENNELLY: I withdrew the question.

THE COURT: All right, the question is withdrawn.

Q. Now, when were you convicted of murder? A. Well, I believe it was in January, the trial started January 11th, and I was sentenced on the 18th, I think.

Q. 18th of what? A. January.

Q. Of what year? A. 1933.

Q. And after you got to the Penitentiary, did you leave the Penitentiary at one time? A. I walked off from the farm.

Q. You walked off? A. Yes, sir.

Q. They had you out on a farm and you walked off, is that right? [327] A. After I had been there about ten years.

Q. After being there about ten years? A. Yes, sir.

Q. Were you ever tried for that? A. No.

MR. RILEY: If the Court please, counsel knows that life termers can't be tried for escape.

MR. HENNELLY: Come up here please Mr. Riley.

THE COURT: Let's make an objection without making a statement.

MR. HENNELLY: I object to counsel stating the law Your Honor, as I presume Your Honor will state the law, and I don't know whether that is the law or not. I don't

know of anything in the law that so says. The question was, was he tried for it.

THE COURT: Do you wish to make an objection to that question Mr. Riley?

MR. RILEY: Object to it for the reason that the statutes of the State of Missouri, provides that any convict confined in the Penitentiary, or being in the Penitentiary, and out under guard for a period of years less than life can be convicted of escape and no other. That is the statute and that is the way the statute reads, for a term less than life.

THE COURT: Well, the objection will be sustained, for the reason given, and for the further reason that it is not material to the issues in this case, whether he walked off or whether he didn't walk off, or whether he was tried or [328] wasn't tried. We are trying James William Stidham and you may ask him whether he has been convicted, but that is all.

MR. HENNELLY: May I represent to the Court that this man is in Cole County, and that I ask it for the purpose of showing interest, and if there are some crimes that they can still charge him with, and this man has testified for the State, I don't do it to affect his credibility, I do it to show interest.

MR. RILEY: Are you going to prove that he was in Cole County when he walked off?

MR. HENNELLY: I am not going to prove anything, I am just asking him a question.

THE COURT: The objection is sustained to the question asked, as to whether or not he was tried for walking off. He admitted that he walked off, or left.

Q. Are you being held in the Penitentiary now? A. No, I am held in the Cole County jail.

Q. You are in the Cole County jail? A. That is right.

Q. Do you know a Mary Annis?

MR. RILEY: If the Court please, I fail to see the materiality of whether he knows Mary Annis, object to it for that reason, doesn't prove or disprove any issue in this case.

THE COURT: What is your purpose?

MR. HENNELLY: Come up here. (Out of the hearing of the Jury) [329] I have been given some information to the effect that these prisoners are being held in the Cole County Jail, and that they have access to a prisoner by the name of Mary Annis, who is also over at the Cole County Jail, and that is one of the continuing reasons why he has an interest in the case. I do it for the purpose of interest and for the purpose of determining just, showing his interest and his credibility.

MR. RILEY: I don't see where the interest is.

MR. HENNELLY: If someone has arranged to give a life termer access to a woman and while he is under sentence and then he is testifying for the State, I think that is a matter which goes to his credibility and shows his interest.

THE COURT: We would never get through with the trial of this case if we went into everything. We might even find out how many times he goes to the toilet and things of that kind. The objection will be sustained.

MR. HENNELLY: I want to make an offer of proof on it.

THE COURT: All right.

MR. HENNELLY: I want to prove by this witness that he is presently stationed in the Cole County Jail, and that while he is in the Cole County Jail, that he has access to one Mary Annis, who is over at the Cole County Jail.

THE COURT: Has access?

A. Access, and he can visit her in her cell or she in his.

THE COURT: And that is all your offer of proof is, you just want [330] to show that?

MR. RILEY: I would like to ask counsel now if he is prepared to prove that Mary Annis is in the Cole County Jail?

MR. HENNELLY: There is a question before the Court, I am not going, I am asking him a question, nobody asking me a question.

MR. RILEY: I am asking you.

THE COURT: And I have a right to know whether there is any foundation to the question. You can't just inject matters into the trial of a lawsuit, that is the reason I called counsel up here, when the objection was made, to determine what line of testimony it was that was being elicited, so that I could determine whether or not it was material, and whether I should overrule or sustain the objection.

MR. HENNELLY: If the Court asks me, I will tell you that the Defendant is in receipt of information from the Penitentiary that this is the situation.

MR. RILEY: If the Court please, that is hearsay, founded upon hearsay.

MR. HENNELLY: All he has to do is answer yes or no.

THE COURT: By my ruling on this matter, I want the record to be clear, and counsel to understand that I am not, and don't intend to preclude the defendant from showing by questions or otherwise, the interest of this or any other witness. They may be asked, and in fact you have asked this witness at the outset whether he was promised anything or made any promises in [331] order to make his testimony, and you certainly have a right to inquire as to the interest of a witness. The offer of proof that has been made, relative to this particular question doesn't show, in my opinion, any materiality. However, I don't

think it would, in view of what counsel for the defendant has said, I don't think it would make much difference whether this question was answered or not. I think the witness may answer the question as to whether or not he knows, or does not know a Mary Annis. He can answer that yes or no, and then as far as anything else connected with the offer of proof, I don't think with this witness at least that it ought to be pursued. I think counsel has a right to inquire as to the interest of the witness however.

MR. HENNELLY: Excuse me, I want to ask him further if he is permitted, if he has been permitted to visit Mary Annis in her cell, or if Mary Annis has been permitted to visit him in his cell, during the time that he has been in the Cole County Jail.

THE COURT: And to that, you intend to object.

MR. RILEY: Yes, sir.

THE COURT: And to the objection that is made to that offer of proof, the objection will be sustained, but the witness may answer whether he does or does not know Mary Annis. The question Mr. Witness is, do you know a Mary Annis in the Cole County Jail?

[332] A. Yes.

THE COURT: Now the record may show your offer of proof and the objection to it, and I sustained the objection.

MR. HENNELLY: I have no further questions Your Honor.

Redirect Examination by Mr. Riley

Q. Creighton, did you see anyone else, other than the seven that you have named, go into Donnell's cell? A. At the time he was killed?

Q. Yes. A. No.

Q. I believe that is all Your Honor.

MR. HENNELLY: No further questions Your Honor.

THE COURT: You may take charge of the witness. You may step down. We will take a short recess.

THE COURT: (Out of the hearing of the Jury) Since the recess I have been thinking about the matter that I just previously ruled on, and the offer of proof that was made by the defendant, and that the record might be clear, I think I did say, that I recognized that the Defendant has a right to show the interest of the witness, to affect his credibility as a witness, but I may not have made it clear enough, and I want to restate, for the purposes of the record, that I believe the defendant would have a right to show, I don't think this was contained in your offer of proof, but I am making this statement so that there will be no misunderstanding about my ruling. I think the [333] defendant would have a right to show by asking the witness Creighton, if he had been made any promises, or had been offered any inducements to testify in this case, through some arrangement with Mary Annis or anybody else, that it might be. I didn't want to preclude you from asking that question. I think you have a right to inquire of this witness if there has been some deal or some arrangement made, whereby he is to have any special privileges in return for his testimony, and then he may answer that question of course yes or no, however he wants to answer it, but I wanted you to understand by my ruling, that I didn't want to preclude you from showing the interest of the witness in that regard. I just didn't think that the offer of proof that was made was material to the way that it was made.

MR. HENNELLY: Very well Your Honor.

THE COURT: So, if you want the witness called back.

MR. HENNELLY: Your Honor, I think that the offer of proof was that I asked him if he has had, whether he was allowed—

MR. RILEY: You asked him whether he was allowed to visit Mary Annis in her cell, and whether he was permitted to visit her.

THE COURT: My point is that that is an immaterial matter, doesn't prove or disprove any issues in this case. I think the witness can be asked whether or not—in order to show his interest, whether or not he has any deal or any arrangements for [334] his testimony, and that this was part of it, or something of that kind, but I think to just ask him a question, whether he visited her back and forth in the cell, that doesn't prove or disprove any issue in this case.

MR. HENNELLY: I think it is a Jury question with respect to the general circumstances which surround his being in the County Jail as a life prisoner, when all the rest of them are in the Penitentiary.

THE COURT: The only question as to that particular witness, whether they believe or disbelieve his testimony, isn't what the arrangements or motive or anything might be, only insofar as those things would affect his credibility as a witness. It would be the same as proving, trying to discredit a witness' testimony by specific acts of immorality. You can't prove a witness' incredibility by specific acts.

MR. HENNELLY: You can show his interest by specific acts.

MR. RILEY: I might say to the Court here that there hasn't been any offer of proof to show that I, as Prosecuting Attorney, or the State of Missouri as Plaintiff in this case, have ever made any arrangements for this testimony.

THE COURT: That is right, but I think the Defendant would have the right to ask the question, and then how they wanted to follow it up from there on, that would be a matter to pass upon at a later point in the trial, but I think that they can lay the foundation for proof to prove

the bias or prejudice, or [335] what is the word I am trying to think of.

MR. HENNELLY: The interest?

THE COURT: Yes, the interest, yes, the interest of the witness. All right, at least the record shows that the witness, the Court will permit the witness to be recalled in line with the statement of the Court here.

MR. HENNELLY: My original offer of proof still stands as to that question.

THE COURT: Yes. But I wanted you to understand by my ruling on the original offer of proof, that I didn't mean to imply that you were precluded from inquiring as to the interest of the witness. I don't think the Court's Statement is sufficient to destroy whatever the effect of that question and answer might be. I take the position that with that offer of proof and that that would in and of itself be evidence for the Jury to consider, whether or not he had any interest in the matter.

THE COURT: All right.

HERMAN TROUT,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. State your name please. A. Herman Trout.

Q. Mr. Trout, will you speak up loud enough so all the Jurors can hear you? [336] A. Yes, sir.

Q. Mr. Trout, you are an inmate at the Missouri State Penitentiary? A. That is right.

Q. And where is your home? A. You mean where I am staying now?

Q. Before you went to the Penitentiary, where was your home?

MR. HENNELLY: Object to that, totally irrelevant and immaterial.

Q. All right, I will withdraw it. I will ask you if in 1928 you were convicted of a crime, the crime of rape? A. Yes, sir.

Q. And sentenced for two years? A. Yes, sir.

Q. And if in 1931, you were convicted of the crime of larceny of an automobile and sentenced to two years? A. Yes, sir.

Q. And if in 1937, you were convicted of robbery? A. Yes, sir.

Q. And if in 1952 you were convicted of assault, no, robbery and kidnapping? A. Yes, sir.

Q. And are you presently serving that sentence in the Missouri State Penitentiary? A. Yes, sir.

Q. How old are you Mr. Trout? [337] A. Forty-five.

Q. On the night of September 22nd, 1954, what part of the Penitentiary were you in? A. Well, I was in the main body of the Penitentiary.

Q. What building? A. You mean when the riot broke out?

Q. Yes. A. In B and C Dining room.

Q. Where did you go from there? A. Well, I went over to E Hall to investigate the noise that I heard and when I seen it was a riot I went back and told my plumber's helper.

MR. HENNELLY: Object to this conversation between this witness and the plumber's helper.

Q. Don't tell what you told your helper, tell what you did. A. I came back and told John Dallas.

MR. HENNELLY: Object to what he told—

Q. Don't tell what you told him, say what you did. A. Oh, well I went over there to see what was going on, and I seen the riot was in progress, so I came back to my shop where I worked.

Q. Where is your shop? A. In B basement, what you call B basement.

Q. Now Trout, I will ask you to turn around and look at State's Exhibit No. 1, and can you point out on that exhibit where your shop was? [338] A. Yes, sir. This is my shop here and this is a part of the shop where the supplies were kept and below that shop is the boiler room where the water and heat is made, and turned on for B and C Hall and these are the steps leading down into B basement and C basement, and this is C side and this is B side.

Q. What did you do then, do you recall Trout, about what time that was? A. Yes, it was between six and six-thirty.

Q. All right then, what happened? A. Well, I taken my plumber's helper and we got the tools which might have been a benefit to the other people.

MR. HENNELLY: Object to that statement if Your Honor please, that is not responsive and I think it is a voluntary statement and a conclusion on the part of the witness.

THE COURT: Well, overruled, the question however, is what did you do, and just tell that. Tell what you did.

A. We taken the tools from this place, this room here, and this room here and we went below this room here to the boiler room and we got to the boiler room we hid the tools and then we came back up the stairs and this being a door here with a screen door on here, and this door here was a plain door, we decided that we would take one door—

MR. HENNELLY: Object to this section if Your Honor please, this includes certain elements of hearsay.

[339] Q. Don't say what you decided, just say what you did.

THE COURT: Sustained.

A. Well, I took—

THE COURT: May I explain to the witness Mr. Trout, that we are not concerned with things that you might, statements like you decided to do this or you decided to do that, we want to know just what you did, just your actions. You may tell that without telling what your decisions were before you made those actions.

A. Well I stood in front of this door a while and in front of this door a while and then later there was a boy came down by the name of DeLapp and a boy named Kenton followed him down a few minutes later, and this door here led to Death Row. They went to work on this door here with some sledge hammers and crowbars and picks and other small tools and they continued to work on this door and he had bad luck working on this door and had to send out and get some tools, DeLapp sent Kenton and Hoover out after some tools.

Q. Now, this Hoover, is that William R. Hoover? A. Yes, sir.

Q. You know him, don't you? A. Yes, sir.

Q. And this Kenton, is that Paul Kenton? A. Yes, sir.

Q. Paul Edward Kenton? [340] A. Yes, sir.

Q. You know him? A. Yes, sir.

Q. All right. A. So after a few minutes they returned with the tools and brought them back and turned them over to DeLapp. They continued to work on this door. Well, they couldn't get the door open, so DeLapp asked them to quit hammering, and Kenton also asked them to quit talking and hollering, and he hollered back into Death Row, this is Death Row, and said "Slick, this is Curley DeLapp." He said, "We will be in to get you if it takes, costs us hell or high water." And he had trouble relaying that message down to Death Row, and two or three times this was repeated over and over.

Q. Did you hear Slick, or Stidham answer? A. Well, I don't know whether it was him that answered, but when Hoover would holler someone would answer him, to the name of Slick Stidham.

Q. Who did you say was hollering? A. DeLapp, Curley DeLapp.

Q. Well, you just said Hoover. A. If I said Hoover, I didn't mean Hoover, I meant DeLapp.

Q. Now then, what happened? A. Well, Hoover had got down there by this time, and him and Kenton and DeLapp, Hoover, Kenton and DeLapp, they held a conversation right here in front of this door. Then it was [341] decided—

MR. HENNELLY: Object to this, that will be a conclusion.

THE COURT: Sustained.

Q. Don't tell what they decided, just tell what they did. A. DeLapp sent Hoover and Kenton out to burn the buildings, so they went on up these steps here and went out into the population, and I don't know where they went after they left there, but they did go out and come back, and when they got back, DeLapp asked them if everything was taken care of, and he said yes.

MR. HENNELLY: Object to this conversation for the reason it is hearsay and not binding on this defendant and no connection shown with it.

Q. It will be all right to strike that.

THE COURT: All right, it may be stricken.

Q. Don't say what anyone said, unless you are asked to say it, just tell what they did. A. Well, Hoover and Kenton came back and wasn't gone very long, I don't know the exact minutes they were gone. He came back and when Hoover came back he walked in this door and he sat down on a five gallon paint bucket.

Q. What was in that paint bucket? A. Knives.

Q. What kind of knives? A. Knives being used at the twine plant to cut twine with, with [342] probably a five or six or seven inch blade.

Q. All right, go ahead. A. And after they brought these in here, they put a boy by the name of Vidauri to watch these knives. And about that time, there was a boy came down these steps here with another party and their names are Blake and Noble. They came down and joined Vidauri. So DeLapp he was still trying to work this door and somebody produced an acetelyne torch and brought it down these steps and set it about here where they tried to get through this door here, but they couldn't get this torch to work, they tried to put gas in it and they called DeLapp over here to this step here and talked to him.

Q. Don't say what they said. What happened next, don't say what they said. A. Well, they decided to disband.

MR. HENNELLY: Object again, if Your Honor please.

THE COURT: Sustained, don't tell what they decided, tell what they did.

Q. Tell what they did. A. Well, they loitered around here until DeLapp had opened this door, but until, before they got this door open they decided to go through this wall here. So they came in this door here.

Q. Now, who went in that door? A. Noble and DeLapp and Red Stoots and a boy by the name of Bates [343] and a boy by the name of Miller, and Hoover, Kenton, and there was a number of guys that went in there and out while this work was being tried on this door, leading, it is not a door, they was trying to make a door through this wall here.

Q. How did they try to make that door? A. With a sledge hammer.

Q. Did you see them? A. Yes, sir.

Q. Could you see into that room? A. Yes, sir.

Q. Which wall were they beating on? A. Right there.

Q. At this time, we offer State's Exhibit No. 12.

THE COURT: This is the room that has previously been identified by other witnesses as the inside wall of the Christian Science Room, and the classification room?

MR. RILEY: Yes, sir.

MR. HENNELLY: The record can show that I am going to object and except to its introduction.

THE COURT: I think this witness should first be handed this exhibit to see if he recognizes it.

Q. All right. I show you what has been marked as Exhibit No. 12, and I will ask you if you know what that is? A. Yes, sir.

Q. What is it? Don't show it to the Jury until you tell the [344] Court. A. This is the hole in this wall here leading to Death Row.

Q. Did you see it there that night at anytime? A. Yes, sir.

Q. Is that photograph, does that photograph correctly represent the scene there at the time? A. Yes, sir.

Q. At this time we will offer it.

MR. HENNELLY: The Defendant will object to the introduction of Exhibit 12, for the reason no proper foundation has been laid for its introduction, and for the reason it is hearsay and to introduce it under these circumstances would be in violation of the Constitutional Rights of the Defendant.

THE COURT: Overruled, it may be received in evidence. What is the number of that?

MR. RILEY: Exhibit No. 12.

THE COURT: Don't look at the legend on the back Gentlemen of the Jury, just look at the front of the picture.

Q. All right Trout, well, what happened next? A. They tried to go through this wall to Death Row. This was unsuccessful and they went back and went to work on this door here and DeLapp asked a bunch of boys to get back and give him plenty of room to work and so he used quite a number of men, some of them, I don't know, and I didn't recognize, but they was successful in opening this door, and they failed to [345] go through this hole here to Death Row. Now, after they got this door open, they had to go through the third door which was right here.

Q. Is that the third door or second door? A. Second door. This leads to what you call the kitchen in Death Row.

Q. Then there is a third door leading to Death Row? A. This would be the door to Death Row. This is the cell here and here is the outside screen and you can go down the outside, and you don't need to use that door, but if you want to go in Death Row, you have got to open this door, but you first have got to open the second door before you can open the third, so they proceeded to knock this door open. DeLapp had bad luck getting this door open. So he had Noble and Kenton both beating on this door and two or three guys that I didn't recognize. Then they decided that they would take a left handed man to open this door, as you see here the lock is on this side of the door. So if you try to hit that lock right handed, you can't hit it right handed. You can't get no power on the sledge, and they sent out and got a colored man to knock this door open. DeLapp, when he was delivered down there to DeLapp, DeLapp told him, I want you to knock that door open, and he hit it about ten licks and this door came open and Dietzel, Captain Dietzel was in this corner here. Kenton and Noble taken charge of Dietzel, held him captive [346] sitting on a table right there until this third door was opened. After they taken him over, then Noble went back

and DeLapp, they went to work on this door here, and didn't take long to get this door open, because—

Q. Now Herman, when was the first time that you saw the defendant Stidham? A. Well I saw the Defendant Stidham, it was after the door was opened, they came up this aisle with DeLapp in front.

Q. Where did they go? A. Came out here and stopped right there.

Q. Now, who was there? A. Stidham, Laster, Noble, Kenton, Vidauri, and Miller and Hoover, and a number of guys that weren't so spectacular.

Q. Did you hear any conversation between Stidham and any of the others that you have named? A. Yes, sir, I heard DeLapp when DeLapp turned this corner right here, and he said, "Get back men, they are coming out now." And he brought them on out here and they stopped here and DeLapp, he put his arm around Stidham's shoulders, and he said, "Gentlemen I have brought you this far, this is your leader from here on."

MR. HENNELLY: Object to that, and ask that it be stricken and the Jury instructed to disregard it, and a mistrial declared.

THE COURT: Overruled.

[347] Q. Then what happened? A. Stidham said, "Well men, I am ready to work." So they went across this hall here, and went into this room here, where the knives were being kept and guarded by Vidauri and Noble and some of the other boys, mostly Vidauri. So after they were in there a few minutes, they came out and went back to this door here, through this door here and back into Death Row.

Q. Just a minute, did you see the Defendant Stidham with a weapon? A. Yes, sir.

Q. When did you first see him with a weapon? A. I seen Stidham with a weapon when he went through this door here.

Q. You mean going back down? A. Yes.

Q. And did DeLapp have a weapon that you saw? A. Yes, sir.

Q. And what about Noble? A. Noble had a weapon.

Q. What about Vidauri? A. Vidauri had a butcher knife.

Q. And was Vidauri, did Vidauri make any statement there in the presence of the Defendant Stidham? A. Yes, he told Stidham, Stidham told him, he said you go ahead [348] standing right here by this door, and Vidauri said, no, I am going with you, I am all the way with you guys. So he too went back through this door.

Q. Did Vidauri say anything else? A. Well, he walked up and down here with a butcher knife in his mouth while they was getting this door open.

Q. All right, go ahead, and then what happened? A. Well, they went down in Death Row and back in Death Row and stayed back there a few minutes and then they brought the guard out, Captain Dietzel out, and brought him up through here, brought him up these steps, and on up in B Hall.

Q. Who brought him out? A. Well, Kenton and Noble was on one side and Laster and Stidham was right behind him, and then you couldn't tell about how many was trying to get to him, looked like some of them were trying to stab him in the back.

MR. HENNELLY: Object to that, and ask that it be stricken, and the Jury instructed to disregard it, and a mistrial declared.

THE COURT: Well, the objection will be sustained to what it looked like. That answer may be stricken. The witness may testify what he saw and not what it looked

like. He can just tell, and the Jury will determine what it looked like, that is their problem. The objection is sustained and the request for a mistrial is denied.

[349] Q. When was the next time you saw Stidham? A. The guard was taken upstairs and then later they came back down the stairs.

Q. Now, who is they? A. Noble, Kenton and Stidham and Laster and Vidauri and Hoover and there was two or three guys back in there.

Q. Did DeLapp go upstairs? A. DeLapp?

Q. Yes. A. Did he go upstairs?

Q. Yes. A. Yes, sir.

Q. Did he come back down? A. Yes, sir.

Q. Now, did they all come down in a group? A. No, sir. Some of them, this railing is at the top of these stairs, and some of them come this way and some come this way. They all went to this door back into Death Row.

Q. What happened then? A. Well, after they were gone a few minutes, why they was gone down in Death Row and then they came back out, and Hoover and Noble came to this door here and they got some more tools out of there.

Q. What kind of tools? A. Sledge hammers and a crowbar.

Q. Now, I will ask you to look at the sledge hammer there, which has been marked Exhibit No. 9, and I will ask you if you [350] ever saw a sledge hammer, that sledge hammer, or one similar, similar size there? A. Similar size, yes, sir.

Q. You don't know whether it was that one or not? A. I don't know if that is it or not.

Q. All right. Who did you say got that sledge hammer? A. Noble and Hoover.

Q. All right. Where did they go with it? A. They went back into Death Row with it. They went back through this door and back down to Death Row, and then after they were gone a few minutes, I heard the hollering kick up again, and there was—

Q. I can't hear you. A. I say the hollering kicked up again.

Q. All right. A. And there was quite a bit of hollering back there and they was gone quite a while.

Q. Now, were there lots of inmates down in B basement that night? A. Yes, sir, there was. There was, sometimes there was quite a number and sometimes they thinned out for a while.

Q. Now, this time that you speak of, these seven going back in Death Row, how many inmates were down in B basement? The Death Row side, if you know? A. There was one or two men down there besides the Defendant, but that is all.

[351] Q. Where had the rest of them gone to? A. DeLapp came up the outside of the corridor here with a board and he waved all of them upstairs, he said men go upstairs. He said go to B Hall, we are going to put up at B Hall on top, and he asked them all to leave there. And a boy by the name of Fisher was cooking in this corner, and he told him to get his stove and eggs and bacon and go to the top floor of B Hall, and that is where they would make their stay for their demands.

Q. What is the next thing you saw? A. Well, after they, after this hollering died down in the corner, why Stidham, Laster and Noble and Kenton and Hoover and Vidauri and all came out.

Q. Now, where did they come out of? A. Came out of Death Row.

Q. Inside of the cage or outside of the cage? A. From where I was standing, I couldn't see no further

than this door, but they came out of inside of the cage. Now, while they was back there, Hoover I mean DeLapp did go in and out of there. He was knocking out lights and whatnot and tried to knock them all out, but he didn't knock out the lights in the cells, but he knocked the lights out here that extend out where he could reach them and knock them out, and the last light, the last light he knocked out was right here in front when they left.

[352] Q. All right. A. When they came out of here, they came over to this wash basin and they proceeded, everybody washed their hands, some of them discarded their clothes, and—

MR. HENNELLY: Object to that for the reason that it is too vaugue, that section, some of them.

Q. What part of the clothes did they discard?

THE COURT: The objection as to some of them, may be sustained. He may testify who they were, if he can.

A. Well, Noble and Stidham taken off their undershirts and discarded them here, and the entire bunch washed their hands at this wash basin. Then they came on out and came out at this door and came up these steps and done as they had been, some went up one side and some went up the other. They didn't stay very long after that.

Q. Mr. Trout, you say this started between six and six-thirty? A. Yes, sir.

Q. When is the next time you looked at your watch or did you have a watch? A. Nine-fifteen is the only time that I did look at my watch.

Q. And what time was that in relation to these occurrences? A. These occurrences, well, it was when they first taken the guard upstairs, when he had went upstairs.

Q. It was between, about nine or nine-fifteen? A. Yes, sir.

[353] Q. Now Trout, where were you standing when you could see these things?

MR. HENNELLY: Object to the form of that question if Your Honor please.

Q. All right. Tell this Jury where you were standing during the time that you just related? A. Well, up until the last time that they came out of Death Row, I could stand anywhere that I wanted to, but after they went back into Death Row, and met Kenton along about here, Kenton had a crowbar and so, I watched Kenton, followed him out of here and went back and took my stand here on these steps and this door here opens back to the wall on this side, and I stood down them steps and had all the lights turned out when the riot first started in this room, and this room, and I stood down them steps and had all the lights turned out when the riot first started in this room, and this room, and the basement. I stood down on this step and standing at this step you can see through the bars to this door that is as far as you can see.

Q. Where did Kenton go? A. Where did Kenton go?

Q. Yes. A. He came out here and milled around here a while, and after I went out here and took my stand out there, after a while he went back into Death Row.

Q. Herman, did you hear anything unusual during the time that these seven were back in Death Row? A. Yes, I heard a man screaming and hollering.

[354] Q. What did he say, if you can remember?

MR. HENNELLY: Object for the reason that that would be too vague, indefinite and speculative, and the time and the person is not fixed. It gives the witness a roving commission.

THE COURT: This was at the time they went, you have testified, let me ask you this, you have testified that this group of seven, I think that you have named them,

went back down to Death Row and they had, you testified that they had weapons. Now, and you have also testified that they came out and that you saw them wash. Now, did this that you have heard, or that you were asked about that you heard, the statement that someone made, did that occur between that period or before that period or after that period? A. That occurred while they was in Death Row, yes, while they was back there.

THE COURT: The objection will be overruled and the witness may answer.

A. Well, I heard the boy holler, he said, "I am not a snitch and I have never done nothing to you," and then he hollered, "Oh, Oh", and he made another holler.

Q. Now, how did he holler that? A. He hollered so loud I could hear him plum up here. Now, two or three times I walked out of these steps while they was back in there and I could hear him very plainly hollering. It was a scream, it wasn't a holler, it was a scream, shrilling voice.

[355] Q. You don't know who was doing the hollering, do you? A. I don't know who done it.

Q. Now Trout, I will ask you, did you at anytime that evening, did you leave B basement? A. Did I leave B basement?

Q. Yes. A. After I once come back there?

Q. Yes. A. I went up to my cell one time.

Q. Where was your cell? A. B Hall, and—

Q. Mr. Trout, did you hear any shooting in B basement that night? A. Not in B basement, no, sir.

Q. I believe that is all Your Honor.

Cross-Examination by Mr. Hennelly

Q. Mr. Trout, where are you presently celling? A. Where am I?

Q. Yes. A. Cole County Jail.

Q. You are in the County Jail, you are not in the Penitentiary, is that right? A. Yes, sir.

Q. You are there at your request for your own protection? A. No, sir.

Q. Did you request to go there? A. [356] A. No, sir.

Q. And of course you haven't been offered anything at all for your testimony, have you? A. That is right, I haven't.

Q. And has there been any discussion at all about cutting down your time, or any parole or anything? A. No, sir.

Q. Never was mentioned in the course of all of your discussions, is that right? A. Never has.

Q. Never has? A. No.

Q. And let me ask you this, when was the first time after the night of September 22nd that you first told the authorities anything about this situation? A. Well, now, who do you call the authorities?

Q. Well, anybody with the State? A. State Patrol authorities or officials of the prison?

Q. Yes. A. I told the State Highway Patrol.

Q. Well now, the State Highway Patrol— A. I told them about two weeks.

Q. About two weeks later? A. Yes, sir. That is purely a guess. I don't know exactly the date it was.

Q. Could it have been longer than that? A. It possibly could and it could have been shorter. I don't know.

[357] Q. Now then Mr. Trout, what job did you have in the Penitentiary. A. Plumber.

Q. Plumber. A. Yes, sir.

Q. And I believe—will you indicate on State's Exhibit 1 which is that chart in back of you, where your place is, your toolroom? A. Right here, part of my tools are in here, and part of them are in there.

Q. Now then, on the night of September 22nd, were you in your tool room at about six-thirty? A. I came back there at approximately between six and six-thirty.

Q. Did you stay in your tool room for a while? A. Stayed long enough to get the tools and get them downstairs.

Q. Where did you take them to? A. I taken them down to, under this room here, down in the back of the blower and pushed them out in the ventilator.

Q. Now had that been, was that also after there had been some commotion? A. Well, there was a yard full, the yard was full then, and they was working upstairs and was getting the doors to the locks to the cell and door open to the cell houses, opened at that time.

Q. Now, besides doing that with your tools, did you do anything [358] else? A. Yes, sir.

Q. What did you do? A. Well, you have got a boiler down there that makes your hot and cold water. So I turned off the main valve going to the boiler then, I cut off the main valve to block the steam from coming in there.

Q. So did you turn off the water and steam from Death Row? A. As far as that valve goes, yes, sir.

Q. Sir? A. Now, I can't turn off the water for B Hall and C Hall, after you get down here. Now, the plug for the water, the valve for the water that controls the complete hall is out in front of the steps in the ground. You have to have a key to do that.

Q. Well, did you turn off both the hot and the cold water for B basement? A. No, sir, just the water that leads to the boiler, the hot and cold that leads to the boiler.

Q. Sir? A. Just the hot and cold that leads to the boiler.

Q. Page 87 Mr. Riley. I am going to ask you if you recall certain questions being asked you and certain an-

swers being given by you in the Laster trial, the first trial in Jefferson City. A. Yes, sir.

[359] Q. I will ask you if these questions were asked, and these answers given, "Q. What do you mean turn off the water? A. Anything like that, we turn off the water and attempt to keep it from hurting anybody or keep it from being used to advantage anybody. Q. That is the water inside the hall? A. Yes, sir. Q. Or in the boiler room? A. Over our boiler room, the heating system." I am going to ask you if those questions were asked you and those answers given? A. Yes, sir.

Q. Now, has anybody discussed that section of your testimony with you since the Laster trial? A. No, sir.

Q. Nobody talked to you about that? A. No, sir.

Q. Since then, is that right? A. No, sir.

Q. All right. A. Now then, tell me, now you say no one discussed it with me, now the same thing has been practically asked over and over in every trial, but I thought you meant when I had been discussing it, had anyone tried to tell me what I turned off and what I didn't turn off.

Q. What I mean is, did anybody with the Prosecuting Attorney's office, or with the State Highway Patrol, go over that section of the testimony with you? A. No, they don't need to.

[360] Q. Now then, I will ask you this, where did you go in order to turn off that water? A. All right, you go down the steps here and you go down and turn back and come back like this. Now, this valve is right here, would be about here, comes down to a wash basin that we had down there to wash clothes in, or the plumber's bath.

THE COURT: Is that on a floor below that plat you are pointing to?

A. Yes, sir.

THE COURT: It is not in where the cells are, it is a floor below, a basement? A. Yes, sir.

THE COURT: But you are pointing to a place in the basement? A. You have to go through this door to go down there.

THE COURT: All right, go ahead.

Q. Now, when you go there and turn that water off, you can turn that water off at the floor, right there? A. Yes, sir.

Q. All right. A. Now wait a minute.

Q. I am sorry, go ahead. A. You can't turn off the water there for your main valve leading to your boiler room. Now you can climb up on what you would call a makeshift bench we have there and turn it off there, and we do move that around in working on this, fool [361] around to turn off any valves that is off the ground. Also the steam comes from this direction, I beg you pardon, comes from this direction, and comes over here and back, and if you want to turn this off, you have got to move that back around there.

Q. All right. A. To turn it off on that side.

Q. Now, what time was it when you got back to B basement after having turned off that water? A. After I got back to B basement?

Q. Yes. A. You mean after I got back up here?

Q. Yes. A. Didn't take very long.

Q. Well, what time, do you have any idea what time it was? A. Well, no I don't have no idea, just to the exact minute of what time it was.

Q. I don't ask you that Mr. Trout, would you say it was seven o'clock when you got back up there? A. No, I wouldn't.

Q. Would you say it was a quarter to seven? A. No, I wouldn't. I wouldn't say it was later than six-thirty.

Q. Six-thirty? A. Yes, sir.

Q. Now then—

THE COURT: Were you wanting to say something else?

A. Yes, sir.

[362] THE COURT: All right, go ahead.

A. It didn't take long to take these tools down there and hide them and turn off that water. Gonzalles was my plumber's helper, I mean I was his helper, and we just done what entered our minds at the time.

Q. I am going to object to that answer and ask that it be stricken.

THE COURT: The part about doing what entered their minds at the time may be stricken.

Q. Now, I am going to ask you, after you got upstairs then, where did you go after you had turned off that water? Indicate on State's Exhibit 1 just where you stood or what you did. A. Well, I stood anywhere I wanted to around here, but most of the time I watched this door, and Gonzalles watched this door.

Q. Now, do you have any connection with any leather work up there in the Penitentiary? A. Yes, sir, that is a privilege of anyone, any prisoner can have.

Q. Now, do you have some, did you have some leather equipment or some leather material which was stored somewhere? A. Yes, sir.

Q. And where was that stored? A. Well, part of it was down in this basement here and part of it was in this room here, before you get down to the basement.

[363] Q. Now, did you make any attempt to guard that material when those prisoners got in there? A. Yes, sir.

Q. Now, where would you have to go to guard it? A. I stood in front of this door and Gonzalles stood at this door.

Q. Now then, how long were you standing there at those two positions before, excuse me, strike that, at the position you were standing before you left there? A. Well, I don't know, because Gonzalles had more trouble on this door than I did over here, although my door did get knocked open one time, but I went over here to his defense two or three times, and we was always able to persuade the people that we couldn't give out the tools to them, and we didn't have no tools.

Q. All right. Now, what time was it, taking into consideration the time that you went down to turn off the water, what time was it to the best of your knowledge, that there was first a breakthrough into B basement, into the lobby proper? A. Into the lobby?

Q. Yes. A. Now, you call this the lobby?

Q. No, sir, I call this the lobby. A. This the lobby?

Q. That is right. A. You want to know when this door was opened?

[364] Q. No, I am asking you when is the first time that anybody ever congregated down in here? A. Well, right after we come back with the tools, DeLapp appeared there, which would put it about twenty-five minutes to seven I suppose.

Q. And how many men came in at that time? A. DeLapp was the first man on the scene, and there was a man come down and brought some tools with him that I could not identify and never have identified him.

Q. How many were there, were there a hundred there at that time? A. No, just three down there.

Q. Three? A. For the first few minutes.

Q. Then after the first few minutes, how many were there? A. Well now, in a period of five or ten minutes, I would say it filled up completely down there.

Q. Now, when you say it filled up completely— A. I mean this corridor right here. Now, this door was open

here, leading back into the hall like this, and they kept going back in there.

Q. Now, all right. Now, excuse me, while this section filled up completely, where were you, were you still standing over near the plumber's room door? A. Right here.

Q. And in front of what has been marked on State's Exhibit 1 as a fan room? [365] A. Yes, sir.

Q. You stayed there, did you? A. Yes, sir, when I wanted to, and when I didn't want to, I went anywhere I wanted out there from here.

Q. Did you stay there? A. No, not all the time. I just went anywhere I wanted to.

Q. Now, where did you go if you didn't stand there? A. Anywhere within this corridor and I went in here, and I asked the boys not to tear out this basin and not to tear out the light fixtures, and brought them out of there, and this place here was on fire here, and I asked them to put that fire out.

Q. All right. Now then, how long was it before anybody broke into the first door, which has been indicated here to be right in front of the main gate to B basement and Death Row gate No. 1? A. You want to know when the door was opened?

Q. Yes. A. Well, the Defendant had done come out of B basement or Death Row before I looked at my watch and that would be nine-fifteen.

Q. Then this door had to be opened before nine-fifteen, didn't it? A. Yes.

Q. Did you see them break it open? A. Yes.

[366] Q. Now, how long were they standing there working on it in point of minutes, was it a half hour or forty-five minutes before they broke open that door? A. Well, I don't know, because I didn't know I was going to be asked that.

Q. Do you have any idea how long it took them sir? A. How long it took them to open the door?

Q. Yes. A. Why anything I would say would be purely a guess on that part.

Q. Give us your best estimate that you can. A. Well, I would say at the time that this door was opened here, it was about fifteen to nine. That would be purely a guess.

Q. About fifteen minutes to nine when the first door was opened? A. Yes, sir.

Q. Now, during that time, did you see Captain Dietzel? A. Yes, sir.

Q. Where was Dietzel? A. You mean until this door was opened did I see him?

Q. Yes. A. The first hour prior to the time the door was opened, Dietzel would come up here and talk to them now and then, and stood within seeing distance most all the time.

Q. Now, your testimony is that they broke the first door open [367] by force, is that right? A. That is right.

Q. Did they break the second door open by force? A. Yes, sir.

Q. And the third door was by force? A. Yes, sir.

Q. And where were you standing when all that was done? A. Anywhere I wanted to in this corridor.

Q. But they did break it open by force, there wasn't any keys used in doing that, because you saw it, isn't that right? A. Yes, sir. The only door that didn't give them a lot of trouble was the third door leading to Death Row.

Q. How much trouble did they have with that? A. How much trouble they had on that, I don't know, but it wasn't very much.

Q. All right. Now then, after they broke in the first door which was about eight forty-five or quarter to nine,

can you tell the Court and Jury how long it took them to get into that second door? A. Not very long.

Q. Fifteen minutes or half an hour? A. Well, you can put it fifteen minutes, I think it would be close enough.

Q. And then how long did it take them to break into the third door? [368] A. Less than it did this.

Q. Well, would you say they got into the third door by ten minutes after nine? A. Yes, I would.

Q. All right. Now, they still had to break into a fourth spot, didn't they? A. Fourth spot?

Q. Did they have, is there another door, another lock that has to be opened before they can get down into Death Row? A. No, you have got to break this door and this door. Now, if you want in them cells you have got to break another lock to get in them cells, or unlock it. I don't know how— I didn't go back to here, and I don't know how they broke them locks.

Q. Where would that be, where would those cells be opened? A. Where would they be opened, where can they be opened from?

Q. Yes. A. You have got a lever here, but you have got a safety key and a master key, and you can put the lever on center and then you can work it with a key from any position you want in there, but if it is up or down, then you can't unlock it neither way.

Q. Now, do you, can you tell the Court and Jury where you were standing at the time they finally got down into Death Row? [369] A. When they got down to Death Row?

Q. Yes. A. I never did go into Death Row only one time I went down here to visit with an inmate named Ford.

Q. That is a colored fellow? A. Yes, sir.

Q. Let me ask you this, had you left the building now to go up to your own cell by nine-fifteen? A. By nine-fifteen?

Q. Yes. A. Just before nine-fifteen I told Gonzalles—

Q. You mustn't tell us what you told him, that would be hearsay. Did you leave the B basement prior to nine-fifteen to go to your cell? A. Yes, sir.

Q. And what time was that approximately, if you know? A. Well, it would be ten minutes after nine, because I came right back and sent him on to his cell to watch his cell because the men were at the cell.

Q. How far did you have to go to get to your cell? A. Well, I celled in 43-B and 43 is about here, and I would have to go up these steps here to 43 and came back down here.

Q. Now, when you say Cell 43, you of course are not indicating that it is on this same floor, are you? A. No.

Q. Where is it, is it in that building? A. On the next floor [370] up from this basement right here.

Q. And you say you left there at about ten minutes after nine, am I correct in that? A. Yes, sir.

Q. And you then went up to your cell, and what did you do up there? A. I told my cellmate that I was going to stay down in the basement the rest of the night, and was going to send Gonzalles to his cell, and I asked him to take my cell.

Q. All right. Now, as you left to go upstairs, do you recall, was there still a large group of men congregating into the lobby? A. There was very few men in the lobby.

Q. Were there men running up and down those, within the cage when you left to go upstairs? A. There was men all over them rails, standing more so on the walk than they was upstairs.

Q. Now, can you give the Court and Jury any idea the amount of time it took you to leave B basement and go upstairs and do whatever business you had to do, and come back down, was it ten minutes? A. No, I would say five minutes.

Q. Now prior to the time that you left to go upstairs, which was ten minutes, about ten after nine, had you seen Stidham yet then? [371]A. Had I seen Stidham yet then?

Q. Yes. A. Yes, sir.

Q. You had seen Stidham before that time? A. Yes, sir.

Q. Now, taking into consideration the fact that you went upstairs at ten minutes after nine, can you give the court and Jury any idea of the time it was after they broke in that third door, that you first saw Stidham? A. How much time it was?

Q. Yes. A. I would say from this door to this door, and time he come out, must have been thirty or forty minutes.

Q. I didn't ask you about that second door, I am asking you about the third door, you recall when they went in there, don't you? A. Yes, sir.

Q. All right now, how much time later did you see Stidham? A. It would be merely a guess.

Q. Give us the best estimate that you can. A. I would say thirty minutes.

Q. Thirty minutes? A. Yes, sir.

Q. Now then, which would fix it at about what time sir? Taking into consideration the fact that you left there at ten minutes after nine? A. Ten-forty.

[372] Q. I am sorry, what time? A. Be nine-forty.

Q. Nine-forty? A. Yes, sir.

Q. Is that the first time you saw Stidham? I may have misled him Your Honor, and I don't mean to.

THE COURT: Well, the witness of course has testified repeatedly that he is only giving estimates as to time. Now with that in mind, and the questions, you may proceed then with your questioning, since there is no objection.

Q. Tell us again, was it before you went upstairs that you saw Stidham the first time? A. Well, no, I saw Stidham before I went upstairs.

Q. Before you went upstairs? A. Yes, sir.

Q. Now, how much time before you went upstairs, did you see Stidham? A. I don't know.

Q. You don't know? A. No.

Q. All right. Now, when you saw him, where was he? A. Right there. He came out of Death Row cage right there.

Q. And where were you standing at that time? A. Right here.

Q. Still guarding the leather you got there? A. No, I was there. There was a boy shot and he had come up there and asked me to do something for him, anything I [373] could do for him, and I told him to stand here by this door, and when I got a chance, I would get him down these steps, as I had all the lights turned out and he was shot, and I later taken him and two more guys down in the basement and kept them down there all the rest of the night.

Q. Now tell me, when did you take that man that was shot down in the basement, did you take him down about the same time you saw Stidham? A. Well, I am not going to try to tell you what time, because I don't know what time it was, but it was the time that DeLapp come up and run all of them out. I told him, I said now is your chance to get down here, go in here and go slowly down the stairs and when you get at the bottom of the stairs stop, and I will come and get you and take you back to the boiler room.

Q. Now, so you left B basement at that time yourself, didn't you? A. Yes, sir.

Q. And you took this man—where was he shot sir? A. In the hip.

Q. Shot in the hip, and you assisted him where? A. Back to the boiler room.

Q. And how long did that take you? A. I don't know.

Q. Would you say that took you as long as ten minutes? [374] A. I imagine it would.

Q. Would you say it might have taken you as long as twenty minutes? A. No, I didn't spend much time down there.

Q. Now, that was the man you— A. Not the first time. I didn't spend much time down there.

Q. You were gone ten minutes with him, and what about these other two men that you took, how much time did you spend taking them out of the basement? A. I taken them all at once.

Q. You took all three of them at once? A. Yes, sir.

Q. Now, if you can recall when you came back up from the basement, did you see Stidham then? A. When I first came back up?

Q. When you came back after taking those three men down in the boiler room? A. No, I didn't see him then.

Q. All right now, were there any other men in that lobby on the outside of Gate 1? A. Yes, sir.

Q. Were there quite a few out there? A. No.

Q. How many were there, if you can remember? A. There was a few stragglers out here yet, but most of them [375] were coming out of here trying to find their way back to their own cells. They were coming out of C basement. Now, I was clear out here.

Q. Now, when you testified about Trout, something about slapping people on the back, and that Stidham slapping some people on the back, and there was a conversation there? A. Yes, sir.

Q. Was that before or after you took those three men down into the boiler room? A. That was before?

Q. Before? A. Yes, sir.

Q. And did you then immediately leave to go down into the boiler room? A. No, sir.

Q. How much time did you stay up there after that conversation and that back slapping that you saw before you went down in the boiler room? A. I don't know, but after the time he brought this bunch in, it give me a chance to put these guys in here without anybody seeing them, and I asked them to step down there while they was marching out.

Q. All right. But when you left, can you tell the Court and Jury where Stidham was when you left to go down in the boiler room? A. No, I can't.

Q. You didn't see him, did you? A. No, I didn't.

Q. And I believe you indicated that there was some talk about "I have taken you this far", or something like that, and now— A. Yes, sir.

Q. And was that at the same time they came out at first? A. Right here, that happened right here at the steps.

Q. Now, did you see Stidham leave at anytime, leave the lobby of B basement and go back into Death Row? A. Go back into Death Row?

Q. Yes. A. Yes, sir.

Q. All right sir, now taking into consideration this time of ten minutes after nine, can you give us any idea when it was that he went back into Death Row?

MR. RILEY: If the Court please, I think counsel has gone into this time for a long time here, and he is now repeating it, and it is now repetition, and he has gone over it, and this witness says he doesn't know how long it took, and he only has estimated it.

THE COURT: Well, the question of course, and the way it is asked, assumes a fixed time, and there has been no fixed time, except nine-fifteen, that I know of.

Q. I withdraw the question and I will try to fix a time based upon the time—that question is withdrawn Your Honor.

[377] Q. Taking into consideration the time that you left to go down into the boiler room, had Stidham gone back to Death Row yet at that time? A. Stidham went back into Death Row right after he came out.

Q. All right now, tell us what he did? A. He came over here and then he walked over into here somewhere, and back out through here and back into Death Row.

Q. Was that when you left to go down into the basement? A. No, sir.

Q. Did you remain the lobby? A. Yes, sir.

Q. You hadn't been in the basement yet? A. Yes, sir, I had been down there and put the tools down there.

Q. Had you been down there to take those three men down there yet? A. No. Now while they was back there, this boy came up and run everybody out of there, and when he run them out of there, that give me a chance to put them down in there.

Q. Now then, you were gone then for ten minutes with those three men?

MR. RILEY: He assumes he was gone for ten minutes, with these three men.

Q. His best estimate.

[378] THE COURT: All right, he may answer that question. However, I believe the testimony was that it took at least ten minutes.

Q. At least ten minutes, yes Your Honor. It wasn't at that time then that you heard this hollering by anybody back there, was it? A. No, sir.

Q. All right. Now when you came back up, was Stidham out in the lobby yet then? A. No, sir.

Q. Let me ask you this, did you at anytime see any men with any masks on, in that lobby? A. Yes, sir.

Q. Now, tell us when it was that you saw some men with some masks on? A. Right after this door was opened, there was Noble and Hoover and Kenton and Vidauri, they went down there, and there is a door right here leading down in, you can see these steps into what you call a bathroom. Now, they went this way and came back with masks on.

Q. Now, when you say masks— A. I am saying rag masks.

Q. Something to cover up their faces? A. Some of of them covered up from here like this, and left the mouth open and some left their eyes and mouth open and some left their hair open and some had their hair covered up.

[379] Q. Now, can you tell His Honor, and this Jury which ones of the men you saw put those masks on?

MR. RILEY: If the Court please, he hasn't said he saw anybody put them on.

Q. Withdraw the question. Can you tell us which ones of the men you saw with the masks on? A. Yes, sir.

Q. All right. Who were they? A. You just want the Defendants' names which have—

Q. Whichever men you saw sir. A. Vidauri, Noble, and Blake and Hoover and Kenton, and a boy by the name of Miller, and there was three or four boys that I know besides, but I don't know their names and they had masks on too.

Q. Would you say then that there were ten men down there with masks on? A. Well, between seven and ten.

Q. And after they—how long did they keep the masks on? A. Until this door was opened—

Q. Which door are you pointing to now? A. The second door.

Q. The second door? A. Yes, sir.

Q. That is when the guard was taken charge of? A. (No answer)

Q. Did they have the masks on when they went down into Death [380] Row? A. Well, I think that most of them discarded them after the guard had been taken.

Q. Did you see any of them with masks on when they went down into Death Row? A. No, I didn't.

Q. Did you see any of those men discard the masks? A. No, I didn't, I don't think I seen a single man discard his mask. I did see Kenton holding a mask like a handkerchief over his face, and telling Dietzel to keep his eyes to the floor.

Q. Now, do you know two fellows by the name of Linder and Thompson? A. Yes, sir.

Q. Did you see Linder and Thompson down there? A. Now which Thompson are you referring to?

Q. Either one of the Thompsons? How many Thompsons do you know? A. Well, I know four in the Penitentiary.

Q. Which four do you know? A. Well now, you don't know people by their given names in the Penitentiary.

Q. Do you know the Thompson that came to the Penitentiary when Linder came to the Penitentiary? A. Is that Frank Thompson's brother you are trying to drag out?

[381] Q. Yes. A. Yes, sir, that is Grant.

Q. That is Grant Thompson, isn't it? A. Yes, sir.

Q. Grant Thompson? A. Yes, sir.

Q. Now, did you see Grant Thompson down there that night? A. No, sir.

Q. Did you see any Thompson that you knew of down there that night? A. Yes, sir.

Q. And which one did you see down there? A. I seen a boy that I knowed as, some of them called him, referred to him as "Oklahoma". I don't know his given name. He was in B and C Hall that night, and also down there.

Q. And do you know a boy by the name of Linder? A. Yes, sir.

Q. Did you see Linder down there that night? A. Now, I say I know Linder. I know Linder by name. I don't know Linder to walk up to him and speak to him or hold no conversation with him.

Q. Do you know Linder if you see him? A. Well, I have been in close conversation with him, but I wouldn't say I would.

Q. Let me ask you, to the best of your knowledge, did you see Linder in that basement that night? [382] A. No, sir.

Q. Now then, after the first time that you saw Stidham come out, can you give the Court and Jury any idea of the length of time that he spent in the lobby before he went back into Death Row, in point of minutes, if you know sir? A. Well, as I said, he done a little talking here, and done a little over here, and then went right back in there.

Q. Now, you know how long he stayed back there on that occasion? A. It wasn't very long, but when he did come back, they brought the guard out and taken him upstairs.

Q. That was Mr. Dietzel, is that right? A. Yes, sir.

Q. And can you indicate on State's Exhibit 1, that chart, where they took the guard to, sir? A. No, sir.

Q. Did they march him through there? A. No, sir.

Q. Where did they take him to? A. They took him out of there sir. I went back there and saw the guard and talked to him in a cell. I am not sure, but I think it was in the fourth cell, but he was in a cell by himself. I wouldn't try to pick no certain cell. I talked to him here and they brought him out this way, and brought him up these steps and on up to B Hall.

[383] Q. All right. Now Stidham was there at that time? A. Yes, sir.

Q. All right. Now, did you see them when they came back down? A. Did I see them when they came back down?

Q. After taking the guard out? A. I am standing on the second and third steps here, either one I want to stand on, two or three, and you can't see anything if this room is dark. Now, I could see them when they turned there back here to go in here, and I could also see them when they went in this door here, very plainly, and the purpose was, everyone went in this door.

Q. All right. Now, did they go right back into Death Row after they came back down from taking Dietzel out? A. Yes, they was gone a little bit before they came back, but they all did come back.

Q. But when they came back down after taking Dietzel out, did they then immediately go back into Death Row? A. Yes, sir.

Q. They went immediately back in? A. Yes, sir.

Q. And who were the ones that went back there at that time? A. Stidham, Laster, Hoover, Kenton and Vidauri.

Q. Now, and Noble? A. And Noble.

Q. Was that the second time that you saw Stidham go back into [384] Death Row? A. Yes, sir.

Q. Was that the last time you saw him go back into Death Row? A. No, sir.

Q. All right now. On that occasion, the second occasion that you saw him go back there, had you yet taken those three men downstairs to the boiler room? A. Yes, sir.

Q. You had been down and back already had you sir? A. Yes, sir.

Q. All right. And after they went back, did you still keep your position sir, over here near— A. On the steps?

Q. Yes. A. Yes, sir.

Q. And were—and you were over in the dark, is that right? A. I was down in the dark, yes, where they couldn't see me.

Q. You were down in the dark where nobody could see you? A. Yes, sir.

Q. Now then, can you give the Court and Jury any idea of the length of time that they were gone on that occasion? A. Well, it would be purely a guess, but I would guess thirty, between twenty-five and thirty minutes. I don't know how long it was.

Q. And how long were they back there before—was it on this [385] occasion sir, that you heard this man hollering? A. Yes, sir.

Q. All right. A. Now they did come out again and came up here to get some tools, and before the hollering taken place.

Q. All right. When you saw them come back down sir, after having been up with Dietzel, and you were hiding here in the dark, is it your testimony that they went back into Death Row and then came out and got some tools? A. Yes, sir, they went back in there and got some tools and went back in there.

Q. Now, how long were they back there before they came back and got those tools? A. They wasn't back there very long.

Q. A few minutes sir? A. I would say five or ten minutes. I don't know how long it was.

Q. Were you still at the same position over there hiding in the dark? A. Yes, sir.

Q. And was there anybody else in the lobby? A. No, sir.

Q. And with the lighting, can you give the Court and Jury any idea with respect to where the lights might have been, either in Death Row or in the lobby proper? A. Yes, sir. This lighting system from here over was completely [386] knocked out, knocked out by sticks and not torn off. This lighting system on the outside here by that time had practically all been turned out. DeLapp turned out this light last in Death Row, before they finally washed their hands and somebody taken a stick and knocked this light out here, as they went out.

Q. All right. Now then, after they went back into Death Row, after—excuse me. After Stidham went back into Death Row the second time, and then you say he came out and got some tools— A. I didn't say Stidham came out and got some tools.

Q. I am sorry, did he come out and get some tools? A. No, he came out where two boys were getting some tools.

Q. Now, did he get any tools? A. No.

Q. And who were the boys that got the tools? A. Hoover and Noble.

Q. Hoover and Noble? A. Yes, sir.

Q. Did any of those men have masks on then? A. No, sir.

Q. And at the time that they got the tools, did you see any implement or weapon of any kind in Stidham's hand? A. No, sir.

Q. Now, now then, you saw, did the three of them leave together to go back into Death Row? [387] A. Yes, sir. I seen not only them three, I saw practically all of them come out at the time, but they didn't come out together.

Q. Now then, when they went back on this occasion, which is the third time, was that the time that you heard this man hollering sir? A. Yes, sir.

Q. All right. Now, how long were they back there before you heard the man hollering and in the method that you have indicated to this Court and Jury? A. Didn't seem like they only had enough time to get back.

Q. Just about enough time to get back there? A. Yes, sir.

Q. Did you hear anybody else hollering besides that man? A. Well, at that time, no.

Q. Did you hear Creighton hollering? A. No. There was some hollering before that, and there was some hollering after that.

Q. All right. Now, was there anybody else in the lobby at that time when those men went back for the third time? A. There was a couple of guys there that I couldn't identify that was back in Death Row with these boys.

Q. A couple of people that you don't know? A. That is right.

Q. You say you couldn't identify them, were they men you had [388] never seen before, or people that you didn't see well enough that you could give the Court any identification of? A. I couldn't give any identification of them.

Q. Now, did you still keep your position, hidden over in the dark sir, in that place that you had been? A. I came out of there occasionally whenever everything was quiet and there was no one around.

Q. Well, did you come out before the men came out of Death Row for the third time? A. No, I don't think I did.

Q. Not at the time you say those men came out and went into that place to wash their hands, were you still hidden over in the dark? A. Yes, sir.

Q. And tell the Court and Jury what happened there sir? A. What happened when they came out?

Q. Yes. A. Of Death Row?

Q. Yes. A. I am standing down on these steps here, and I saw the men come out of Death Row over to the wash basin and wash their hands. This corridor over here, they came out of here and proceeded to go back to B Hall.

Q. They left? A. Yes, sir.

Q. And you, all during that time, you were hidden back in the dark, were you, where nobody could see you? [389] A. That is right. I was on the second or third step leading down to the basement.

Q. Is it your testimony that you don't know who murdered Donnell, sir? A. Yes, sir.

Q. You were not a witness to it? A. No, sir.

Q. You are not a witness to it, are you? A. No, sir.

Q. After those men left, did you see them come back in or come back down anytime after that third visit? A. No, sir.

Q. Did you see any men go back with a flashlight or anything after Stidham and the other group had left to go up to B Hall? A. Now, when DeLapp proceeded to knock this light out and this light here was the last light in the hall, it was pitch dark out there. Now, I did hear a man scooting along, walking in the water, and the water was probably that deep. I seen him walking along there, I could see a shadow, and I believe it was an officer. I taken it for an officer, but I don't know.

Q. Now then Mr. Trout, when was the first time you were convicted of a crime? A. 1928.

[390] Q. And you were convicted at that time of rape in Jefferson City, is that right?

MR. RILEY: If the Court please—

A. No.

MR. HENNELLY: If Your Honor please, I am going to withdraw that, for the reason that I was mistaken, he

wasn't convicted in Jefferson City, he went to the Penitentiary at Jefferson City, I withdraw that.

THE COURT: The witness has testified as to his conviction. Now to go over that would be repetition. Now, if there are other convictions about which he hasn't testified, then counsel will be permitted to ask him about those, but as to the nature of them, etc., I don't see that that is material in this case.

MR. HENNELLY: Practically all cross-examination is repetition Your Honor.

THE COURT: (Out of the hearing of the Jury) The rule on the proving of the conviction of a witness is for the purpose of affecting his credibility as a witness. He may be asked whether he has been convicted of certain offenses and at cetain times, etc., and convicted of a certain offense. Now if he denies that, you can prove that to impeach his credibility. If he doesn't deny it, why it is immaterial.

MR. HENNELLY: Do I understand that the Court is not going to permit me to cross-examine him with respect to his convictions?

MR. RILEY: I am going to object to it, because it is repetition, and if counsel wants to question him about any convictions other than the ones he has testified to—

THE COURT: The ones he has testified to, yes.

MR. HENNELLY: I make this statement, that I want to ask this witness the number of the times he has been convicted and for what crimes.

THE COURT: He has testified to that Mr. Hennelly.

MR. RILEY: We don't object to the question if he has reference to any convictions other than the ones he has testified to.

THE COURT: I don't guess it makes much difference, one way or another, if you want to take all that time. If you have something other than what he has testified

to, that might be pertinent. Go ahead in any event. I will permit you to ask him.

Q. Tell the Court and Jury the number of times you have been convicted and for what offenses. A. Rape, car theft and robbery and robbery and kidnapping.

Q. Were you convicted of an assault?

MR. RILEY: If the Court please, the witness has said what he has been convicted of.

THE COURT: Well, you haven't finished the question. You may ask the question, and don't answer until counsel has an opportunity to object.

Q. I will ask you if you were not previously sentenced to ten [392] years in Jefferson City, beginning on the 21st day of September, 1952, for kidnapping and assault and robbery? A. I don't know how the sentence reads.

MR. RILEY: If the Court please—go ahead.

Q. Did you at anytime while you were in the Missouri State Penitentiary, escape from the Penitentiary? A. 1943.

Q. 1943? A. Yes, sir.

Q. How long were you at liberty sir? A. Until January 4, 1944, I believe.

Q. January 4, 1944? A. Yes, sir.

Q. And I believe your testimony is Mr. Trout, that nobody has even talked to you about any parole or helping you in any way in this case, as a result of your testimony? A. That is right, sir.

Q. No further questions.

Redirect Examiantion by Mr. Riley

Q. Herman, who was the first one that you, first person in authority, either with the Patrol or the Penitentiary, that you told what you seen there that night? A. I told the Deputy Warden, the third day after the riot, Mr. Pory.

Q. Who is Mr. Pory? A. Deputy Warden.

[393] Q. And you told him the third day after the riot? A. Yes, sir.

Q. Now, these boys that were shot, where were they shot? A. They was shot out in the yard in between the halls.

Q. They came from the outside? A. Yes, sir.

Q. That is all.

Recross-Examination by Mr. Hennelly

Q. Do I understand correctly that three days after the riot you told the Deputy Warden about this matter, but that nobody from the State Highway Patrol questioned you until at least two weeks after that sir? A. Yes, sir.

Q. No further questions. That is all.

THE COURT: Now gentlemen of the Jury, we will take our noon recess. Remember the previous admonitions of the Court not to permit anyone to talk to you about this case, nor for you to talk to anybody about it, nor should you discuss it among yourselves, nor should you read or listen to any conversation concerning it. The Sheriff will be there and take you to your dinner, and return you to this Court Room. Don't become separated from each other. I believe perhaps you had better take them upstairs before you go down to the restaurant. Some of them may want to go to the rest room and clean up a little bit.

[394] The Court then recessed from twelve o'clock noon, until one o'clock P. M.

Thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 428) Tuesday, July 19th, 1955, Regular July 1955 Term.

Now at this time, it being noon, trial in this cause is recessed for the Noon Recess.

Now, noon recess being over, comes again the parties by their respective counsel, and comes the jury herein impaneled and sworn to try this cause, and whereupon trial in this cause is resumed and progresses in the hearing of the evidence herein.

PERCY LITTLE,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. State your name please. A. Percy R. Little.

Q. And by whom are you employed? A. The Missouri State Highway Patrol.

Q. How long have you been with the Missouri State Highway [395] Patrol? A. Since 1932.

Q. And what is your rank? A. Sergeant.

Q. And where do you live? A. Cape Girardeau

Q. You are attached to what Troop? A. Troop E.

Q. That is in Poplar Bluff? A. Yes, sir.

Q. Are you acquainted with the Defendant, James William Stidham? A. Yes, sir.

Q. I will ask you if you had a conversation with James William Stidham on or about September 27th, 1954? A. Yes, sir, I did.

Q. Will you mark this Exhibit 16 and this Exhibit 16-1?

Reporter marked Exhibit 16, and 16-1, a confession.

Q. Sergeant Little, where were you when you had this conversation with Stidham? A. I was in the Missouri Penitentiary, an area known as the field house, or athletic building.

Q. Who was present, if you recall? A. There were four members of the St. Louis Police Department, another member of the Highway Patrol and myself.

[396] Q. What were their names? A. I am not sure I can remember the names, Trooper Caldwell of the Highway Patrol was the other Patrolman, and Lieutenant Eitzman of the St. Louis Police Department, and a Patrolman named Jenneman.

MR. HENNELLY: I have no objection if he wants to lead him on that question.

A. I can't remember the names of the other people.

Q. Were there two other Patrolmen, one by the name of Overbeck and one by the name of Billings? A. That is correct.

Q. Sergeant, I show you what has been marked as State's Exhibit No. 16 and 16-1. Can you tell the Court what that is? A. That is a written statement, written by this Defendant Stidham.

Q. Now, Sergeant, in whose handwriting is this statement? A. Written by Stidham himself.

Q. Prior to the time that he wrote that, did you have any oral conversation with him? A. Yes, sir.

Q. And were you in this field house all the time that Stidham was there? A. I think so, yes, sir, I think I was there all the time.

Q. And did anyone threaten Stidham? [397] A. No. sir.

Q. Did anyone promise him anything to make—write this statement? A. No, sir.

Q. Anyone use any violence of any kind? A. No, sir.

Q. Hit him? A. No, sir.

Q. You say he signed this then of his own free will? A. Yes, sir.

MR. HENNELLY: Object to that last statement, if Your Honor please, for the reason it is an invasion of the province of the Jury, and it is a conclusion. I think the question may be did he sign it.

THE COURT: Sustained at this time. He may tell what was done or how it was done, or the conditions surrounding the signing of it.

Q. Was Stidham handcuffed? A. Not while he was writing that statement.

Q. Was he handcuffed when he was brought in there? A. Yes, sir.

Q. Do you recall who brought him in? A. Well, I think I know, I think he was brought in by Caldwell and one of the members of the St. Louis Police, but I am not sure which one.

Q. Did you have any oral conversation with him about the [398] death of Walter Lee Donnell? A. Yes, sir.

Q. Will you state to the Court and Jury just what those conversations were.

MR. HENNELLY: At this point, if Your Honor please, the Defendant moves the Court to conduct a preliminary examination and asks the Court to inquire into the voluntariness of the statement, and to determine whether the statement was given voluntarily, either the oral or the written statement, and we ask that that hearing be conducted outside of the hearing of the Jury.

THE COURT: And the Defendant proposes to show by cross-examination, or by its own testimony the involuntariness of the statement?

MR. HENNELLY: Yes.

THE COURT: The request will be granted. Gentlemen, it will be necessary for some matters to be taken up outside of the hearing of the Jury relative to the admissibility of some evidence. It may take some little time. I wonder if maybe we couldn't move one of those benches in the hall, move one of those into the law library, and we will let you go back to the law library, not to read any of the books, but because it is a little bit cooler back there, and there are some windows, and the windows are open

and it will be a whole lot more comfortable for you in there than it would be in the Jury Room [399] upstairs. So you can go with the Sheriff, and remember about the instruction of the Court not to talk about the case and you can kill time the best you can until we bring you back in. The record can show further Mr. Ehlers, that the library room is one room located in the southeast corner of the Court House and is connected with the Court Room. In fact the door to it opens from the back of the Court Room, and the door that opens out into the hall is the door that is locked, and the Sheriff has been instructed to lock that door and it is just as private as the Jury Room could be, and it is a large room, probably twenty by forty, and it is a lot cooler in there. This is being done because of the convenience of the Jury. This is a very warm day and the Jury Room is located between the roof of the building and the floor of the Court Room which makes it sort of an in-between room, and it is a very hot room. The ceilings of it are only about seven feet high and it is very hot and there is no ventilation except small windows down on the floor.

MR. RILEY: I would like to ask the Court whether or not the Jury, in the law library can hear what is going on in the Court Room?

THE COURT: No, they couldn't hear in there at all. It is sixty-six feet from the front of the bench to the back where the door is that leads into the library, and these are tile walls, and plastered walls. Now, I would suggest that while [400] you have Sergeant Little on the witness stand, that you proceed with your interrogation of him relative to the voluntariness or otherwise of the statement that has been testified about, and he may be cross-examined and then such other witnesses as you have relative to this statement be brought upon the stand and testify as to the statement and the conditions under which it was taken, subject to cross-examination, and at the conclusion of that,

if the Defendant then has any testimony concerning the voluntariness of the confession, he may take the stand or offer such testimony as he wishes to offer, and then at that time the Court will pass upon the admissibility of the statement into evidence, and then the Jury will be recalled, and of course parties will have the same opportunity of presenting the same matter before the Jury. With that statement, you may proceed.

MR. RILEY: That is all I have for this witness at this time.

The following proceedings were had outside of the hearing of the Jury:

Cross-Examination by Mr. Hennelly

Q. Sergeant Little, can you tell His Honor, how far this building that you have referred to as the athletic building is from the Administration Building in the Penitentiary? A. I should think it is about, oh, maybe seven or eight hundred feet from the Administration Building.

[401] Q. Seven or eight hundred feet? A. Yes, sir.

Q. Had you interrogated this Defendant at anytime prior to the time that you took the statement which has already been marked as State's Exhibit 16? A. No, sir, I had never seen him before.

Q. You had not seen the Defendant at anytime prior to that? A. No.

Q. Now, what time was it that you first saw the Defendant in this building Sergeant? A. It was about, oh, between eleven and twelve o'clock, probably around eleven-thirty.

Q. In the morning? A. Of the 27th of September.

Q. Of the 27th of September? A. Yes, sir.

Q. At the time that the Defendant entered that room, you say he was accompanied by some officer? A. There were two officers who brought him down to that building.

Q. Two officers who brought him down to that building? A. Yes, sir.

Q. Now, do you know whether or not they were both members of the Metropolitan Police Department of St. Louis, or do you know who they were? A. As I recall, one was a member of the Highway Patrol, and [402] one was a member of the Police Department of St. Louis.

Q. Now, when the Defendant came down there, how was he dressed? A. As I recall it, he was in the ordinary prison uniform.

Q. And you say that he was handcuffed, was he handcuffed with the handcuffs in front of him or in back of him, if you recall? A. I don't believe I recall.

Q. All right. Was he placed in just the ordinary handcuffs which you use in the normal course of your business, or did he have one of those confining types of handcuffs which also had the leather belt section to it? A. As I recall it, he had on just ordinary handcuffs.

Q. Very well. Now, having come in there at that time, were you seated at the table, or standing or just where were you within the athletic shed? A. Most of the time I was in there, I was seated at a table. Now, I am not absolutely certain that I was seated at that table, or I am not absolutely certain that I was in that room when he was brought in there. I think however, that I was seated at the table, as I remember it.

Q. Now, was there, can you give His Honor any idea of any other furniture that was in that room Sergeant? A. Well, this athletic building, the main room of it is I believe sort of a dressing room is what it appeared to me to [403] be, for athletic events. It had a bunch of benches around the wall and it had one rather large table in there, something like the one in here.

Q. The one you are now indicating is the counsel table here in the Court Room? A. Yes, sir.

Q. Very well. And I believe that was about— A. There was a couple of anterooms to that however.

Q. Now, was the questioning all done in the room that you have referred to here for His Honor? A. The main room.

Q. That was the main room? A. Yes, sir.

Q. And can you tell His Honor what the dimensions were of that room? A. Roughly I would say they were probably twenty by thirty feet.

Q. Twenty by thirty feet? A. Yes, sir.

Q. And I will ask you, how long was the Defendant in there before—strike that. Who did the actual interrogation of the Defendant? A. I think most of the questions that were asked him were by Lieutenant Eitzman of the St. Louis Police Department.

Q. Were you present for the entire interrogation? [404] A. I believe so, yes, sir.

Q. Did you ask any of the questions? A. I think I did.

Q. Was there, did you have with you, any of the folders and files of the identification section of the Penitentiary of the Defendant at that time? A. No, I don't think so. I had a folder, but I don't think it had anything to do with him in particular.

Q. All right. Now, I will ask you, did you, did any of the other men besides Lieutenant Eitzman and yourself, conduct the interrogation? A. I believe that there may have been another question or two asked by some of the other men. I think Trooper Caldwell asked a couple of questions.

Q. Now, can you tell us Sergeant, was the Defendant standing or sitting during the time of this interrogation? A. I think he was standing part of the time and sitting part of the time, as I remember it.

Q. Well, while he was standing, did he still have the handcuffs on? A. I believe his handcuffs were on until

he was ready to start writing the statement, if I remember correctly.

Q. So that during the entire, oral examination, at least he was still handcuffed? A. I believe so, yes, sir.

[405] Q. Now, can you recall, did you begin the interrogation, or did Lieutenant Eitzman begin, if you recall? A. I think Lieutenant Eitzman did.

Q. And when the Lieutenant first began to question the Defendant, I am going to ask you if the Defendant didn't tell him that he didn't know anything about the murder of Walter Lee Donnell? A. I don't remember the Defendant saying anything for a while.

Q. You don't remember him saying anything for a while? A. No.

Q. Did he at anytime while he was in there on that day, deny that he had anything to do with the murder of Walter Lee Donnell? A. I believe he did. I am not too sure about that. I believe he did.

Q. You believe that he did? A. Yes, sir.

Q. Now then, taking into consideration his denial, if that actually happened Sergeant, how much time elapsed before there was some change in his statement, to the effect that he did have something to do with it? A. Oh, I think he had been in there half an hour or so before he indicated that he was willing to tell the truth about it.

Q. He was in there about half an hour before he indicated that [406] he was willing to tell the truth, is that right? A. Yes, sir.

Q. Now, I am going to ask you if during that half hour, did anybody lay a hand on him? A. Not as far as I know of.

Q. Were you there and did you see everything that was going on? A. I was there and I saw him, I saw everything that went on. I was in the room.

Q. You were right near and adjacent to the place where he was being interrogated weren't you? A. Yes, sir.

Q. And you didn't see anybody touch him, and you didn't see anybody strike him, is that right? A. That is right.

Q. I am going to ask you if there was a rope in that room that you saw? A. No, sir.

Q. You didn't see any rope? A. No, sir.

Q. I am going to ask you if it isn't a fact Sergeant, that the Defendant—that a rope was placed upon the handcuffs which were behind him, and that the Defendant was raised off of the ground and permitted to hang for sometime? A. No, sir.

[407] Q. That was not done? A. No, sir.

Q. Am I correct in your statement? A. Yes, sir.

Q. Now, after he had been there for this first half hour and then you indicated that he made an oral statement, what time would you say that he began to make that oral statement? A. Oh, I think somewhere around noon or a little after.

Q. And when did he finish the oral statement? A. It seems to me like it was about twelve-thirty.

Q. And was it, how much time after that did he begin the written statement? A. Well, I believe I misunderstood you there. I think that he completed his written statement about twelve-thirty, or started writing about twelve-thirty or somewhere around that time.

Q. Began the written statement around twelve-thirty? A. Maybe. I just can't remember for sure, but it seems to me like it was. I can't remember whether he began or completed his written statement about twelve-thirty. I think maybe he began it.

Q. Began it about twelve-thirty? A. Yes, sir.

Q. Now, did the Defendant complain of any injury to him while he was there? [408] A. No, sir.

Q. Did he pass out at anytime? A. No, sir.

Q. Didn't lose consciousness and wasn't necessary for any of the officers there to revive him, is that your testimony? A. That is right.

Q. And after he had, you know about what time he finished the statement? A. No, I am not positive about that. He either finished it about twelve-thirty or started it about twelve-thirty and I think maybe it took him about fifteen minutes to write the statement. It was around twelve-thirty one way or another.

Q. Do you know what they did with the Defendant after he left that room, of your own knowledge? A. I didn't go with him when he was moved out of there, but I saw him, I saw him later in O Hall, at the Penitentiary, but I don't know whether he was taken directly there or not from this room. I believe he was.

Q. Now O Hall, is that a place of some type of additional confinement?

MR. RILEY: Well, if the Court please, if this is at a time subsequent to the time that he wrote the statement, it wouldn't be material on this issue.

Q. I don't want to go too far afield Your Honor.

THE COURT: Well, you might inquire as to where he was taken.

[409] Q. I won't go too much further into this.

THE COURT: All right.

Q. Let me ask you this, do you know of your own knowledge whether or not he was returned back to his own cell after he had been first interrogated? A. By his own cell, do you mean in Death Row?

Q. Yes. A. He wasn't in Death Row the next time I saw him.

Q. And you saw him in O Hall? A. That is right.

Q. And you know of your own knowledge how long he remained in O Hall? A. He was there until he was dressed out to go to Springfield Prison, or whatever it is down there.

Q. Did you at anytime subsequent to the 22nd, interrogate or attempt to interrogate this Defendant?

MR. RILEY: What day?

Q. September 28th, 27th, I am sorry. A. No.

Q. I have no further questions of this witness.

MR. RILEY: That is all. Call Lieutenant Eitzman.

LIEUTENANT WALTER EITZMAN,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. State your name please. [410] A. Walter Eitzman.

Q. How old are you sir? A. Forty-seven.

Q. Where do you live? A. 5435 Christy Blvd., St. Louis.

Q. Who are you employed by? A. St. Louis Metropolitan Police Department.

Q. How long have you been with them? A. Little over twenty-five years.

Q. What rank do you hold? A. Lieutenant.

Q. I will ask you if you are acquainted with the Defendant, James William Stidham? A. Yes, sir, I am.

Q. I will ask you if on September 27th, 1954, you had a conversation with Stidham? A. I did.

Q. And where did this occur? A. In the field house of the Penitentiary.

Q. And Lieutenant, I show you what has been marked Exhibit No. 16 and 16-1, and ask you if you know, can tell what that is? A. This is a page and a part of another

page of a statement which was reduced to writing, made by James Stidham.

Q. Whose handwriting is it in? [411] A. James Stidham's.

Q. Is that the Defendant? A. That is right.

Q. Did he write that in your presence? A. Yes, he did.

Q. Did he sign it in your presence? A. He did.

Q. Were you in this room when Stidham was brought in? A. I was.

Q. And how was he brought in? A. Well, Trooper Caldwell and Patrolman Jenneman went to where he was confined, which I don't know, and brought him in in a State Patrol car.

Q. Was he handcuffed? A. Yes, sir. He had a pair of handcuffs on him in the back.

Q. You say his hands were in the back of him? A. Yes, sir.

Q. When did you remove the handcuffs?

MR. HENNELLY: Object. I am sorry, go ahead, that is okay, go ahead.

A. Just prior to him making a statement, writing a statement.

Q. Now, prior to the time he made the statement, did you or anyone in your presence, threaten that Defendant? A. I did not.

Q. Did you or anyone there in your presence promise him anything? [412] A. No, sir.

Q. Did you offer him anything to make that statement? A. Nothing whatsoever.

Q. Did you or anyone else hit him, beat him, strike him in any way? A. No.

Q. Did you or did anyone else there apply any physical force or violence to this defendant in order to get him to make that statement? A. Nothing.

Q. That is all.

Cross-Examination by Mr. Hennelly

Q. Was he held up Lieutenant, with his hand in back of him by a rope and suspended in mid-air, at least with his feet off of the ground for around twenty-five or thirty minutes in order to get that statement out of him? A. No, sir.

Q. Let me ask you this Lieutenant, when he first came in there did he, did he deny that he had anything to do with the murder of Walter Lee Donnell? A. Yes, sir.

Q. And for how long did he persist in that position? A. In denying it you mean?

Q. Yes. A. Oh, approximately half an hour.

[413] Q. Half an hour? A. Yes.

Q. Now, during that time, did you strike him? A. No, sir.

Q. Was he standing or sitting at that time? A. Sitting.

Q. And was he seated there in a chair? A. On a chair.

Q. And what position, what was the position of the other people in the room? A. I was seated about three or four feet away from him facing him.

Q. Were you doing all of the interrogation Lieutenant? A. I did most of it until he made, wrote the statement.

Q. And did anybody else conduct any interrogation? A. Very little, there may have been one or two questions asked, it is possible.

Q. Were all of the officers armed, did you all have pistols? A. That is right.

Q. Anybody have a stick? A. No.

Q. Did you see a rope in there at all? A. No rope.

Q. No rope? A. No.

Q. And for thirty minutes the Defendant denied that he had anything to do with it, and then— [414] A. I wouldn't say that he denied it for thirty minutes.

Q. Well, how long did he deny it Lieutenant? A. Well, just briefly before he made a statement.

Q. For how long would you say that was? A. Oh, maybe ten or fifteen minutes.

Q. Ten or fifteen minutes that he continued to deny it? A. Yes.

Q. Now then, he made an oral statement, did he? A. Yes, that is right.

Q. Now, is all of the information which he gave in the oral statement, was that incorporated into the written statement? A. No, not all of it.

Q. Not all of it? A. No.

Q. Well, what is absent from the oral statement that is in the written statement? A. You mean things that we talked about?

Q. Any admissions of any kind that he made? A. As far as the statement is concerned, it practically covers the facts of the occurrence of the crime.

Q. So that all of the admissions which were made in the oral statement are incorporated into the written statement, is that right? A. No, there are other things that were said, that could pertain to incidents that aren't included in there.

Q. Do you know what any of those are? [415] A. Yes, sir. I asked him questions even after the statement was made, how he felt about Creighton.

Q. And he said what? A. He said he is a lousy son-of-a-bitch, and he said I will kill him the first chance I get.

Q. And anything else? A. I don't recall anything else offhand.

Q. All right now, when he was writing up that statement, who gave him the fountain pen with which to write that, if you know? A. Sergeant Little.

Q. And did he just sit there and write it all in one straight movement and motion, or did anybody tell him what to put in that statement? A. Well, the first part of the statement included a few facts that we were interested in, which Sergeant Little had asked him pertaining to where he was located at the time of the riot, what his sentence was and what for, and the length of his sentence, and after we had the first preliminary part of the statement, then he wrote it out by himself.

Q. There is a statement or something in there about his age, did he tell you that his age was twenty-five? A. That is right.

Q. Nobody told him to put that down? A. His age was twenty-five and we included that in the first [416] part of the statement.

Q. Do you know how old the Defendant is, of your own knowledge? A. Not any different than what he has told me.

Q. I see. When he left there Lieutenant, do you know where the Defendant was taken to? A. I couldn't testify to that. I know where I told them to take him.

Q. Where did you tell them? A. O Hall.

Q. So that you told them to take him back to, take him to some position, or to someplace other than that from which he was first, had first come from, is that right? A. I couldn't testify yes or no to that, because I don't know where he came from.

Q. How did you arrive at O Hall then? A. Well, I had been in O Hall and seen the condition and I figured it was as safe for him or any of the other prisoners to keep him after making a statement.

Q. That it was safe to keep him there, is that right? A. That is right.

Q. Let me ask you Lieutenant, did he pass out at anytime during that interview, interrogation? A. No.

Q. And there was no—when he left he was in perfect, he was at least in the same physical shape that he was when he [417] when he came in to make the statement? A. That is right.

Q. Nobody hit him or anything? A. No.

Q. Nobody held him up in the air? A. No.

Q. Did he complain about even a paralysis of one of his hands from being held in the air? A. Not to me, no, I didn't hear him.

Q. Did you see either one of his hands even shriveling up? A. No, sir, I didn't.

Q. No further questions.

Redirect Examination by Mr. Riley

Q. Lieutenant, regarding the oral statement, did you have any oral conversation with Stidham regarding any motive that he might have had for killing Donnell? A. Yes, sir, I did.

Q. What was that? A. He stated that Donnell was a snitch, that he was no good, and that he had snitched on a couple of fellows from St. Louis who had received quite a bit of time as a result of it.

Q. That included in the written statement? A. No, that is not in there.

Q. Did you tell him what to put in that statement regarding the [418] facts of the killing of Donnell? A. Not what to put in. I told him what we desired as far as the facts were concerned, around the incident of the crime.

Q. But it was, the use of the words in the statement were his own and not yours? A. Exactly.

Q. That is all.

MR. HENNELLY: I have no further questions Your Honor.

THE COURT: Were you there during the entire questioning of the Defendant?

A. Yes, sir, I was.

Q. Of Stidham? A. Yes, sir.

Q. From the time he came in until he was returned? A. Yes, sir.

Q. That is all.

ELMER OVERBECK,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. State your name please. A. Elmer Overbeck.

Q. And where do you live Mr. Overbeck? A. St. Louis, Missouri.

Q. Are you a member of the St. Louis Metropolitan Police Department? A. Yes, sir.

[419] Q. What is your rank? A. Patrolman.

Q. How long have you been a Patrolman? A. Five and a half years.

Q. Are you acquainted with the Defendant Stidham? A. I am.

Q. I will ask you if on September 27th, 1954, inside of the Missouri State Penitentiary, you had a conversation with Stidham? A. Yes, sir.

Q. Did you, were you present when he had a conversation with others? A. I was present.

Q. I will show you what has been marked as State's Exhibit 16 and 16-1, and now what is that? A. I do.

Q. What is it? A. That is the handwritten statement by the Defendant Stidham, as to his participation in the riot, etc., in Jefferson City.

Q. Did he sign that in your presence? A. He did.

Q. Where were you? A. We were in the field house over at the ball diamond in the Missouri State Penitentiary.

Q. And who was there, if you recall? A. Well, myself, Lieutenant Eitzman of St. Louis Police Department, Patrolman Thomas Jenneman of the St. Louis Police [420] Patrolman Charles Billings of the St. Louis Police Department and Percy Little of the Troopers, Sergeant Percy Little, and Trooper Tony Caldwell of the Troopers.

Q. Were you there when the defendant came in? A. I was.

Q. Who brought him in? A. Trooper Caldwell and Patrolman Jenneman.

Q. And were you there all the time that Stidham was there? A. I was.

Q. And during, who was questioning Stidham? A. Lieutenant Eitzman.

Q. During the time Stidham was there did anybody, did you or anyone else promise him anything to make that statement? A. No, sir.

Q. Did you tell him it would be easier for him or anything else? A. No, sir.

Q. Did you hit him? A. No, sir.

Q. Did you beat him? A. No, sir.

Q. In any way? A. No.

Q. Did anybody, you or anyone else use any violence of any kind or nature to get Stidham to make that statement? A. No, sir.

[421] Q. You were there all the time? A. Yes, sir.

Q. Did you hang him up from the ceiling? A. No, sir.

Q. Did anyone else? A. No, sir.

Q. I believe that is all.

Cross-Examination by Mr. Hennelly

Q. Officer, do I understand correctly that when the Defendant first came in, he denied any participation in the murder? A. He denied any participation in the murder?

Q. Yes. A. On the first account.

Q. How long did he persist in that? A. We talked to him I imagine for about twenty-five minutes or thirty minutes, rightalong in there, and he continued to say that he had nothing to do with the murder of Donnell up to that time.

Q. All right. And then after that, he made an oral statement in which he admitted his complicity in it, is that right? An oral statement, in which he did say he had something to do with the murder? A. That is right.

Q. And nobody had hit him or nobody made any threats against him, any threatening gestures or nobody hung him up or anything, [422] is that right? A. Nothing.

Q. Nothing? A. No, sir.

Q. And I am going to ask you, did you go over and get him out of his cell before he was brought into the athletic field house?' A. I didn't.

Q. Did you, did he have a wrist watch on him when he was brought over there? A. I don't recall.

Q. Did you at anytime subsequent to that get the Defendant's wrist watch for him? A. No, sir.

Q. Go to a property room for it? A. On the day of the checkout I went and got a prisoner's wrist watch. I thought it was Laster's.

Q. Let me ask you this, was all of the information which the Defendant gave in the oral statement, was that incorporated in the written statement? A. Phrase that again.

Q. Was everything that was put into the oral statement, was that put into the written statement? A. That is right.

Q. So that there isn't anything that was said by the Defendant in the nature of an admission while he was being questioned [423] orally, which is not included in the written statement, is that right? A. Well, he stated quite a few things there, and I mean offhand I couldn't swear, there might be a few things that he could have left out. He told quite a bit orally.

Q. Do you, can you give us any of those statements now? A. Which statements?

Q. Any of the statements which were left out? A. Offhand I couldn't recall if any was left out.

Q. All right. Now then, I am going to ask you how long in all was the defendant in that room? A. In the field house?

Q. Yes. A. Oh, I imagine an hour or an hour and a half.

Q. An hour or hour and a half? A. Yes, around about.

Q. And did you take him out of there to O Hall? A. No, I never.

Q. You weren't one of the officers that did that? A. No, I never.

Q. And was it necessary at anytime to revive the Defendant? A. Revive him?

Q. Yes. A. No, sir.

Q. All right. Now then, I am going to ask you, did you assist, or did any of the officers in your presence, assist him [424] in writing this? A. No, sir.

Q. Do you recall that the Defendant was asked about his age? A. He stated his age.

Q. What, do you recall now how old he said he was? A. Twenty-five I believe.

Q. He said he was twenty-five? A. I believe.

Q. And here on the statement there is something scratched out and then begins the next time, was there any officer there who told him not to put that there, and to scratch that out? A. No, sir, that was done on his own accord.

Q. Done on his own accord? A. Yes, sir.

Q. How close was the nearest man to him at the time he was writing this out? A. Well, across the way, across the table, which probably would be two and a half feet wide, might be three feet.

Q. And during that time nobody was telling him what to put in here, is that right? A. No, sir.

Q. He went ahead and just started writing, and he wrote the whole thing himself? [425] A. His own.

Q. His own? A. Yes, sir.

Q. Did you notice anything the matter with the Defendant's hand? A. With his hands?

Q. Yes, did you see any paralysis of any of the fingers? A. I never noticed.

Q. You didn't notice anything wrong with them? A. No.

Q. Was he at anytime, was there a coat put on him at anytime, and did you have sit down with his legs handcuffed and his feet and hands handcuffed behind him? A. No.

Q. That wasn't done? A. No.

Q. And there was no rope in there? A. No.

Q. And he was just, he first went in there and denied it, and then he went ahead to tell you, and nobody had to do a thing, or promise him anything or hurt him or do anything else, is that right? A. No, sir.

Q. Thank you very much.

MR. RILEY: That is all. Call Trooper Caldwell.

[426] TROOPER R. C. CALDWELL,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. Will you state your name please? A. R. C. Caldwell.

Q. And where do you live Mr. Caldwell? A. Fredericktown, Missouri.

Q. How old are you sir? A. Forty-seven.

Q. Are you with the Missouri State Highway Patrol? A. Yes, sir.

Q. What is your rank? A. Trooper.

Q. How long have you been with the Patrol? A. Since the 14th day of December, 1942.

Q. I will ask you if you are acquainted with the Defendant, James William Stidham? A. Yes, sir.

Q. I will ask you if on September 27th, 1954, in the Missouri State Penitentiary, if you saw the Defendant? A. On what date?

Q. September 27th, 1954? A. Yes, sir.

Q. And where were you? A. At first I saw him in Death Row of the Penitentiary, and he was taken to the field house of the Penitentiary.

[427] Q. Who took him? A. Patrolman Jenneman of the St. Louis Police Department and myself.

Q. And were you present at the field house all the time that the Defendant was there? A. Yes, sir.

Q. And when he left, how did he leave? A. He was taken in the Patrol car by Patrolcar from the field house to the O Hall.

Q. Now, I will show you what has been marked as State's Exhibit 16, and 16-1, and ask you if that instrument bears your signature? A. The last page bears my signature, and the first page my initials.

Q. And I will ask you if you saw the Defendant, James William Stidham, sign that instrument? A. Yes, sir.

Q. Who wrote it out? A. He did.

Q. Did you see him write it? A. Yes, sir.

Q. Now, prior to the time, did you, who was present there at the field house? A. Sergeant Little, of the State Highway Patrol, Lieutenant Eitzman, Patrolman Overbeck, Patrolman Billings, Patrolman [428] Jenneman and myself.

Q. Did you hear the Defendant Stidham make any statement concerning the Death of Walter Lee Donnell? A. Yes, sir.

Q. Now, prior to the time that he made that statement and prior to the time that he wrote this one, did you or did anyone in your presence, promise Stidham anything? A. No, sir.

Q. Did you or did anyone in your presence hit Stidham? A. No, sir.

Q. Did you or anyone in your presence beat him with any kind of an instrument or your hands at all? A. No, we did not.

Q. Did you, or did anyone in your presence offer to Stidham any physical violence whatsoever? A. No, sir.

Q. Did you threaten him? A. No, sir.

Q. Did anyone in your presence threaten him? A. No, sir.

Q. That is all.

Cross-Examination by Mr. Hennelly

Q. Officer Caldwell, Trooper Caldwell, you are one of the gentlemen that took him from his cell, is that right? [429] A. Yes, sir.

Q. And who was with you at that time Trooper? A. Patrolman Jenneman.

Q. At that time was there any discussion with the defendant with respect to a wrist watch that he had on? A. Not that I remember of.

Q. I will ask you if you recall the officer telling him to leave the wrist watch there, and don't take the wrist watch with him? A. I didn't hear him tell him that.

Q. Now, was he manacled in his cell or just where were the handcuffs put on him? A. The handcuffs were put on him in Death Row before we left Death Row.

Q. And was he handcuffed to the back? A. Yes, sir.

Q. And was he, was there one of those leather belts on him? A. No, sir, there wasn't.

Q. Just the handcuffs? A. A pair of handcuffs.

Q. Now then, this place where he was questioned is quite some distance from Death Row, isn't it? A. Yes, it is several hundred feet.

Q. When you got in there, who was in that athletic shed at that time? [430] A. There was Patrolman Billings, Officer Beck, Sergeant Little, Lieutenant Eitzman, and—

Q. Did the Defendant at anytime during the questioning, request a lawyer? A. Not that I remember of, no.

Q. Did you hear him talking anything about getting a lawyer? A. No.

Q. Do you know whether or not he was confined after he was questioned and placed in O Hall, was he accessible to anyone, either members of his family or to any lawyer or anything after that? A. Not to my knowledge.

Q. He was not? A. No.

Q. All right. Now then, I am going to ask you, did the Defendant deny this matter at first? A. Yes, at first he did.

Q. And how long did he deny it? A. Oh, probably twenty-five or thirty minutes.

Q. And did anybody do anything at all to him, did anybody handcuff him and put the handcuffs in back of him and lift him off of the ground by a rope? A. No, sir.

Q. Until he decided to tell you what you wanted to know? A. He was handcuffed, but not lifted off the ground by rope.

Q. That wasn't done, was it? [431] A. No.

Q. Now, you know how long the oral questioning took place? A. Before he made any admissions orally, I would say twenty-five to thirty minutes he was questioned.

Q. I see. And I am going to ask you, when he was, was he ever—strike that. Was there ever a coat put around him during this questioning? A. No, it was warm weather and it was hot at the time.

Q. And was he ever, did he ever have his legs handcuffed during this questioning? A. No, sir.

Q. And you didn't even see any rope around there or anything, did you? A. No, sir, I didn't.

Q. All right. Now with respect to this, you didn't take him back to the same place you got him, is that right? A. That is right. We took him back to O Hall.

Q. O Hall? A. Yes, sir.

Q. Now, was he placed in a cell with someone else? A. As I remember it, he was placed in a cell by himself.

Q. And do you know of your own knowledge, whether or not the Defendant was given anything to eat over there for several days? A. I wasn't in charge over there, and I couldn't say about that.

[432] Q. Who was in charge of that place? A. I don't know.

Q. Who told you not to take him back to his cell? A. That was our instructions in handling the investigation, that nobody was to be taken back to the cell that they came from. Some of the fellows requested not to be taken back.

Q. Did this Defendant ask not to be taken back to his cell? A. Not to my knowledge.

Q. He had been questioned previously by other State Highway Patrolmen, hadn't he? A. Not that I know of.

Q. You didn't know that? A. No.

Q. I have no further questions Your Honor.

Redirect Examination by Mr. Riley

Q. Trooper, the Defendant, in addition to the written statement made oral statements, didn't he? A. Yes, sir.

Q. I see. A. Yes, sir he did.

Q. Those oral statements were—some were made before this written statement and some after? A. He went over his activities of this particular time orally, before he wrote out this statement.

Q. Did you have any conversation with him after he wrote it [433] out? A. I asked him one question after he had written the statement before we started back.

Q. I believe that is all.

Recross-Examination by Mr. Hennelly

Q. I am going to ask you one question Trooper, were all of the admissions which the Defendant made, in the oral questioning, were they incorporated into the written statement? A. I don't know what is in that statement as far as reading it over. I have never read the statement over, even at the time or since, but did make notes of his oral statement, which I do have.

Q. You have them with you now? A. Yes, sir.

Q. May I see them? Do I understand that during the oral statement, that the Defendant told you that some of the men were masked around there? A. He made a statement that there were a couple of fellows in the cell at the time this killing was going on, that had masks on, and he didn't know for sure who they were.

Q. Now, incidentally, were you seated at the table while writing these notes? A. Yes, sir, I was sitting at

a table writing, with Lieutenant Eitzman and Sergeant Little, when they were questioning him.

[434] Q. Was anybody telling him what to put in that statement? A. No, sir.

Q. That statement about his age, twenty-five years of age, nobody told him about that, did they? A. I don't know whether that is even in the statement or not. I didn't write this statement and never have—

THE COURT: I believe I will have the Reporter mark this Exhibit, make it Court's Exhibit 1, just for identification purposes, same being the statement, or the notes that the witness, Trooper Caldwell, has testified he made at the time of the hearing, and which the attorney for the defense has referred to in his questioning.

Reporter marked Exhibit Court 1.

Q. To close this thing out Trooper Caldwell, at the time that the Defendant left, the time you took him and deposited him in O Hall, he was in the same physical condition as he was when you first brought him from Death Row, is that right? A. That is right.

Q. Did he make any complaints to you of any kind? A. Not to me, he didn't no.

Q. Did he talk to you as you drove him back to O Hall? A. Yes, sir.

Q. And did he tell you then that his hand was hurting from being held up? A. Hand?

[435] Q. His hand, yes, sir. A. No, I don't know anything about any hand.

Q. What did he talk about as you were driving back? A. I don't recall.

Q. You didn't make any notes on that, did you? A. No.

Q. Thank you.

MR. RILEY: You didn't make any notes while you were driving, did you?

A. No.

Q. That is all.

THE COURT: I wonder if you would just dictate your writing on that on both sides to the Reporter, and let him—so he may have it in the record. I want to say to counsel for the Defendant, that the reception of this in evidence is not any indication that this matter is, that these notes as written by the witness are going to be received and presented to the Jury. That is a separate matter and apart.

MR. HENNELLY: In addition to that, I am certainly going to object to them being made a part of the transcript, part of the official transcript in this case, if it becomes necessary to use a transcript, and I think that it would be highly prejudicial and I think that they amount to, in a degree, to receiving evidence in the case if the Court sees fit to hold the statement to be involuntary, after the Defendant's [436] evidence is put on. I don't think this record should include that which is self-serving, and which is hearsay, and that is this officer's notes.

THE COURT: Now the record shows that counsel for the Defendant—that the witness mentioned that he had notes, and counsel for the Defendant asked him about if he had those notes, and he produced them, and counsel for the Defendant read them, and the Court then requested the right to read them, and I want the record to show what I read. Now, I have a right to look at that in connection with other matters relative to the hearing upon the admissibility of the statement. I am not going to let it go before—well I want to make that statement about letting it go to the Jury, because it hasn't even been offered, but I am merely saying that the fact that it is being received here, and I am asking the witness to dictate to the Reporter, into the record, what is contained in his notes, so that the transcript might show what it is that he has referred to, and that counsel has referred to, but in doing so, it does not

mean that same will be received in evidence for the purpose of the Jury seeing it. It is only for this hearing before the Court. Actually the trial of this case is before a Jury, and the Jury are the ones to pass upon the facts of the case, and not the Court, and so I don't think it would prejudice the Defendant one way or the other in the trial in—so your objection is overruled [437] and you may dictate to the Reporter.

A. At the heading, I have Stidham Notes 9-27-54, 11:25 A.M. I was in Death Row when it all started. I believe Kenton was the one who opened my cell to let me out. Stidham stated he cut Donnell's throat with a kitchen knife while Kenton held him from behind. Also that Laster stabbed him several times, with an ice pick or a sharp end of a screw driver. He did not know for sure who hit him with the sledge hammer. Stidham said he wanted to kill old Creighton more than he wanted Donnell, as he had a personal grudge against Creighton.

Q. How did you spell Creighton? A. C-r-e-a-t-o-n.

THE COURT: Go ahead.

A. As he had a personal grudge against Creighton, but only had it in for Donnell because he had heard that he had snitched on several of the boys and they had got a load of time out of it. Also he would still kill Creighton if he got the chance. Cut Donnell's throat with a kitchen knife about six or seven inches long. Somebody in Donnell's cell had a flashlight, they turned on and off. Stidham thought Thompson and Linder were in Donnell's cell and hit him with the sledge. He did not know for sure who they were, as they were masked, but heard them call each other Linder and Thompson. We tried to kill Creighton before we went to Donnell's cell to kill him. [438] That is all.

MR. HENNELLY: I want the record to show that I am objecting to those notes, even being in the record,

for the reasons that I have heretofore stated. I can certainly understand Your Honor wanting to read them to make up your own mind, but to some Appellate Division which I hope won't be necessary, I am saving my record.

THE COURT: All right. You may take your statement now with you, your notes with you. That is all.

THOMAS JENNEMAN,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. Will you state your name please? A. Thomas Jenneman.

Q. Where do you live sir? A. 4549 LaClede, St. Louis, Missouri.

Q. Are you a member of the St. Louis Metropolitan Police Department? A. Yes, sir.

Q. For how long? A. For thirteen years, last December 24th.

Q. And I will ask you whether you are acquainted with the Defendant, James William Stidham? A. Yes, sir.

Q. I wil ask you whether you saw him inside of the Missouri [439] State Penitentiary on September 27th, 1954? A. Yes, sir, I did.

Q. Where did you see him on that date? A. Down in the baseball field, in the athletic shed.

Q. Were you there when he came in? A. I went and got him.

Q. Who went and got him? A. Trooper Caldwell and myself.

Q. And where did you go to get him? A. In Death Row.

Q. Where did you take him? A. Down to the baseball field in the athletic shed.

Q. Is that the field house or recreation building? A. Yes, sir.

Q. Is that what that is called? A. Yes, sir.

Q. Were you there all the time that Stidham was there? A. Yes, I was.

Q. In that building? A. Yes, sir.

Q. Who took him back? A. Trooper Caldwell and myself.

Q. Where did you take him to? A. To O Hall.

Q. And I will ask you if you—I will show you what has been [440] marked as State's Exhibit No. 16 and 16-1, and have you ever seen that before? Officer, does that have your name on the second page? A. Yes, sir, it does.

Q. And your initials on the second page? A. Yes, sir.

Q. Who wrote out those two sheets of paper? A. The Defendant.

Q. Now, prior to writing that statement, did you hear Stidham make any oral statement regarding the death of Walter Lee Donnell? A. Yes, sir, I did.

Q. Now, before he made those statements, did you, or anyone else threaten him in any way? A. There was no threats made by anyone.

Q. Did you or anyone else promise him anything to get him to make the statement? A. No, sir.

Q. Did you or did anyone else ever hit him or strike him or beat him, either with your hands, fists or any other instrument? A. No, sir.

Q. Did you or did anyone else there exert any physical force, or violence of any kind on Stidham to get him to make that statement? [441] A. No, sir.

Q. That is all.

Cross-Examination by Mr. Hennelly

Q. Officer, when you took him to O Hall, were there any other prisoners in O Hall? A. Yes, sir.

Q. Were there any other prisoners in the cell that you put him into? A. No, he was in by himself.

Q. Do you know of your own knowledge, whether or not anyone could communicate with him after he was placed in that cell? A. I don't know.

Q. Do you know whether or not at anytime, from the time you took him from Death Row down to the shack, whether or not the Defendant had asked you if he could get a lawyer or if he couldn't confer with some members of his family? A. I don't recall that being asked.

Q. You don't recall that? A. No.

Q. Would you say that it wasn't done? A. Yes, sir, I will say it wasn't done.

Q. You say that it wasn't done? A. Yes, sir.

Q. And he was in there for about twenty-five minutes or twenty [442] minutes or so, in which he denied everything, but then he told you everything, is that right? A. Repeat that please.

Q. I say he was in there for the first twenty or twenty-five minutes, and he denied that he had anything to do with the murder of Donnell, didn't he? A. He was being questioned for approximately twenty-five minutes.

Q. During this questioning did he deny that he had anything to do with the murder? A. He did,—I don't recall that he did.

Q. Were you right there? A. Not right standing right next to him.

Q. How close were you to him officer? A. At the time, I was approximately ten feet away.

Q. Did you hear all the questions? A. Most all the questions.

Q. Did you at anytime during the first twenty minutes that he was in there, hear him admit that he had anything to do with the murder of Donnell? A. After he started writing.

Q. After he started writing? A. Yes.

Q. That was the first time? A. No, I beg your pardon, when he made an oral statement.

[443] Q. Now, how long did he deny, if he denied it, how long did he deny that he had anything to do with the murder? A. I wouldn't say.

Q. Wouldn't say? A. No.

Q. Was he ever handcuffed by the feet? A. No.

Q. Did you ever see a rope around there? A. No, sir.

Q. Did he complain to you about any injury to the nerves of his arm at all? A. I didn't hear of any injuries. I never heard him complain of any injury.

Q. You didn't take him back to the same place you brought him from? A. No.

Q. I have no further questions.

MR. RILEY: That is all.

MR. RILEY: Call Charles Billings.

CHARLES BILLINGS,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. State your name. A. Charles Billings.

Q. How old are you sir? A. Thirty-five.

[444] Q. Are you a member of the St. Louis Metropolitan Police Department? A. I am.

Q. For how long? A. Eleven years.

Q. I will ask you if you are acquainted with the Defendant, James William Stidham? A. Yes, sir, I am.

Q. Did you see him on September 27th, 1954, in the Missouri State Penitentiary? A. Yes, I did.

Q. Where were you when you saw him? A. In the field house.

Q. Who was present? A. Lieutenant Eitzman, Sergeant Little, Patrolman Jenneman and Patrolman Overbeck and Trooper Caldwell and myself.

Q. I will show you what has been marked as State's Exhibit 16 and 16-1, does that Exhibit bear your signature? A. Signature and my initials.

Q. Who wrote out that Exhibit? A. James Stidham.

Q. Did you see him write it? A. Yes, sir, I did.

Q. Did you see him sign it? A. Yes, sir, I did.

Q. I will ask you if prior to the time that he made this [445] statement, that he made an oral statement in your presence? A. Yes, he did.

Q. Now, before he made any statement at all, did you or did anyone in your presence promise him anything to get him to make that statement? A. No.

Q. Did you or anyone in your presence threaten him in any way to get him to make that statement? A. No, sir.

Q. Did you or anyone else strike him, beat him or exert any physical violence whatsoever toward him to get him to make that, or the oral statement? A. No.

Q. That is all.

Cross-Examination by Mr. Hennelly

Q. Officer, did you hear any conversation with respect to the Defendant's watch? A. I don't recall.

Q. I will ask you if you at any time, while the Defendant was there, you heard the Defendant request a lawyer? A. No.

Q. Did you hear him request permission to talk to any members of his family? A. No.

[446] Q. Now Officer, did you see any rope in that room? A. No.

Q. And while you were there, nobody threatened him or did anything to him? A. No.

Q. Did anybody even lay a hand on him? A. No.

Q. Nobody did a doggoned thing to him, he just changed from denying it and he admitted the whole thing, is that right? A. Yes.

Q. And then he wrote out this statement, is that right? A. That is right.

Q. Is all of the information that he gave in the oral statement, is that incorporated into the written statement? A. Yes, as far as I can recall.

Q. I have no further questions.

MR. RILEY: That is all we have Your Honor.

MR. HENNELLY: I would like to call Mr. Stidham to the stand.

JAMES WILLIAM STIDHAM,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Hennelly

Q. What is your name? A. James William Stidham.

Q. Speak loudly Mr. Stidham. A. James William Stidham.

[447] Q. Mr. Stidham, were you questioned with respect to the death of Walter Lee Donnell, by either the State Highway Patrol or by any of the authorities after the night of September 22nd, 1954? A. Yes, I was on many occasions.

Q. Who was the first one to question you? A. The first ones to question me was probably eight or ten officers which included St. Louis Patrolmen and State Troopers, they came to my cell.

Q. When was that? A. That was on September 23rd, sometime before noon.

Q. And were you questioned at any time—excuse me. Did you deny any complicity in the murder of Walter Lee Donnell?

MR. RILEY: Object to him leading the witness.

Q. Very well, I withdraw the question. The question can be withdrawn.

THE COURT: All right.

Q. What did you tell those people who were questioning you with respect to whether or not you had anything to do with the death of Walter Lee Donnell? A. I told them I didn't know anything about it, that I didn't participate in it. I didn't know who killed him and I was informed that I had better learn something about it or—

Q. Who informed you of that? [448] A. That was the St. Louis Patrolmen and the State Highway Patrol.

Q. Now, were you questioned at anyplace other than in your cell in Death Row? A. Well, I was probably questioned three times that day in my cell, and later on that night I was carried to what is called the prison classification room.

Q. Now, was that the questioning that has been referred to here in Court, were you questioned in the room that has been, which is indicated on State's Exhibit 11? A. Yes, sir, I was.

Q. Now, who questioned you at that time? A. At that time I remember Lieutenant Barton, State Highway Patrol, Sergeant Tony Caldwell.

Q. Anybody else? A. Sergeant Little, he was present, E. V. Nash was present and Barkley.

Q. And what did you tell those officers and people questioning you on that occasion, with respect to the death of Walter Lee Donnell? A. That I knew absolutely nothing about it.

Q. And do you know what time of the day or night you were questioned? A. I was called to the Classification room at three A.M.

Q. Three A.M. in the morning sir? [449] A. Yes, sir.

Q. What day would that have been, do you know? A. That would have been on the 24th.

Q. And do you know how long you stayed in that room? A. Approximately an hour and a half.

Q. An hour and a half? A. Yes, sir.

Q. Now, after they finished questioning you at that place where were you sent? A. Back to my regular cell.

Q. Back to your regular cell? A. Yes, sir.

Q. Were you questioned at anytime after that? A. Yes, sir, I was.

Q. When were you questioned the next time? A. That was on the 26th.

Q. And who questioned you then? A. It was a group of Troopers, State Troopers and the St. Louis Police.

Q. Do you know who any of them were? A. I recall Sergeant Nash.

Q. And where were you when you were questioned on that occasion? Were you in the classification room? A. Yes, sir.

Q. And what did you tell them at that time with respect to [450] your knowledge of the death of Walter Lee Donnell? A. Still didn't know anything about it.

Q. Where were you taken after that questioning? A. Back to my same cell.

Q. And during this time, had you made any attempt to contact any counsel? A. Yes, sir, I had.

Q. What did you do? A. Two days after the riot ended, the mail clerk, his name is Mr. Fiel, he came around and informed all the prisoners that they would be permitted to write one letter saying that they were all right. So

at that time I sat down and I wrote a letter asking my people to come see me and also get me a lawyer.

Q. All right. A. I put enough postage on it to register the letter, but it never left the prison.

Q. Never left the prison? A. No, sir.

Q. Now, who were the lawyers you were attempting to contact at that time? A. Richard M. Webster.

Q. Where is his office? A. First National Bank Building in Carthage, Missouri.

Q. Did you, were you questioned at anytime after that Mr. Stidham? [451] A. Yes, sir, I was.

Q. And when was the next time you were questioned? A. Well, in my cell, I was questioned probably twenty-five times.

Q. Who questioned you on those occasions? A. Different St. Louis Policemen and State Highway Patrolmen.

Q. And were you questioned, was the next time you were questioned after these times that you have so far indicated to His Honor, Judge Weber, the time that you were questioned over at the athletic shed? A. That was on the 27th.

Q. On the 27th? A. Yes, sir.

Q. Now, tell the Court and Jury exactly what transpired from the time you left your cell in Death Row, until you, first of all until you got to the athletic shed? A. On the morning of the 27th, about, approximately ten A.M., two officers came to my cell, and before they put the cuffs on me, told me to take off that watch before they messed it up, so I took it off and I gave it to a trusty.

Q. Who was the trusty, do you know? A. Leon Wade.

Q. Leon Wade? A. Yes, sir.

Q. Go ahead. A. And my hands were cuffed behind and I was taken outside of [452] B and C Building, where a St. Louis Police car or State Highway Patrol car was

sitting, and put in there and driven to the athletic shed or field house.

Q. All right, what happened over at the athletic shed? A. When I walked into the door, they told me to sit down on a stool. I sat there and as soon as I sat down, some officers got in front of me and began to put handcuffs and a belt on my legs, and at the same time, some officer took the cuffs off from behind me, and I had a coat on and had handcuffs on my wrists behind me.

Q. Now, let me ask you this, were you standing or sitting at this time? A. Sitting.

Q. Do you know which officer in the room did that? A. No, sir, I don't, because there was at least four or five participating in it.

Q. All right. A. There was a couple behind me and a couple in front of me putting the belt and cuffs on me.

Q. Was everything that was done there, was it done by those officers who have testified in this court here today? A. Yes, sir.

Q. All right. Now then, after they tied your hands behind you, and manacled your feet, tell the Court what happened? A. Well, one of the officers said he wanted me to tell him [453] everything that happened in that riot.

MR. RILEY: Object to that unless he can say who said it.

A. Lieutenant Eitzman.

MR. RILEY: All right.

A. And I told him that I already had been interrogated on numerous occasions, and that each time I told the officers that I didn't know anything about the riot and that I certainly didn't know who killed Walter Lee Donnell, and I didn't participate in the killing of Walter Lee Donnell, and I told him that if it wouldn't convince him, that I wasn't in it, that I would be willing to submit to a

lie detector test, and go under truth serum, and at that time Lieutenant Eitzman said all right, give him the test. Apparently at that time they had already put a rope between the handcuffs because I was lifted up in the air where all my weight had to bear on my two arms.

Q. Now, were you taken out of the chair before that was done? A. Yes, sir.

Q. And how long were you in there before you were hung up? A. Probably not more than ten minutes.

Q. And up to that time you had denied anything to do with it? A. Yes, sir.

Q. Now, how long did you hang up there, if you know? [454] A. I would say fifteen minutes the first time.

Q. And did they, were any officers having any conversation with you while you were hanging? A. Yes, sir.

Q. How far off of the ground were your feet? A. Probably six inches or maybe a foot.

Q. And what happened, did they cut you down or let you down? A. They let me down after about fifteen minutes.

Q. Then what happened? A. They helped me over to a table. I couldn't walk because I still had those cuffs and belt on my legs, and they tried to talk me into signing a statement that they wanted to dictate to me.

Q. All right. A. And I refused to sign it. Consequently Lieutenant Eitzman ordered me hung up again.

Q. All right. Now did they hang you up in the same method and manner you had been previously hung up? A. Yes, sir.

Q. How long did you remain in that position the second occasion? A. While I was up, I was beaten with clubs and I passed out, and became unconscious, lost consciousness twice, and I don't know how long I hung up, but I heard one of the officers [455] say that I had been

hanging there for about thirty-five minutes. My left arm became paralyzed as a result of that hanging.

Q. Was there some numbness in your left hand as a result of that? A. Completely numb, no feeling in it whatsoever.

Q. What happened after that, after you had been hanging there for that length of time, tell His Honor, what happened then? A. As a result of that thirty-five minutes hanging, I agreed to write a statement that they dictated to me, that Sergeant Little dictated.

Q. Did you, why did you sign this, why did you write this statement? A. I lost consciousness twice and I felt my arms were about to come out of the sockets, and I couldn't endure the torture any longer.

Q. They forced you to sign it? A. Yes, sir.

Q. Now, I am going to ask you, that statement that you wrote down, is the statement which has been offered to the Court and for the purposes for which this hearing is being presently conducted, State's Exhibit 16— A. This is the statement that Sergeant Little dictated to me.

[456] Q. Now then, I am going to ask you, how old does that statement say you are? A. It says that I am twenty-five years of age.

Q. How old were you on the 27th of September, 1954? A. I was twenty-eight.

Q. Twenty-eight? A. Yes, sir.

Q. Who told you to put down twenty-five? A. Sergeant Little.

Q. Now then, after you left there Mr. Stidham, were you taken back to your cell again? A. No, sir, I was taken to O Hall.

Q. All right. Now tell His Honor just the circumstances under which you went to O Hall and how long you remained there? A. I went to O Hall approximatey 12:40 or 12:45 on September 27th, and I was placed in a cell,

where all there was was a bare floor, no running water in there or any toilet fixtures and I was only allowed to keep a pair of pants and shoes on. All the windows were broken out in there. I wasn't given any food or water for three days.

Q. How much did you weigh on the night of September 27th 1954, to the best of your knowledge? A. Well, two days, it was either two or three days before the riot when I weighed, and I weighed one hundred and eighty-four.

[457] Q. One hundred and eighty-four pounds? A. Yes, sir.

Q. Did you have reason and opportunity to be weighed at sometime after you had gone through this ordeal in the shack? A. Yes, sir, I did.

Q. Where were you weighed? A. That was at the U. S. Medical Center at Springfield, Missouri.

Q. How much did you weigh on that occasion? A. One hundred and fifty-nine pounds.

Q. And do you know how much, you know what date that was that you were weighed then? A. That was on September 29, 1954.

Q. Now, during the time that you were in that cell in O Hall, were you visited by anyone? A. A Catholic priest attempted to visit me, but he wasn't permitted to, because the officers already had received instructions that nobody was to see me.

Q. All right. Now then, how long did you remain in that cell in O Hall? A. Three days, two days I believe, and I left on the morning of the third day.

Q. Now, tell His Honor what happened when you left the cell in O Hall? [458] A. Some officers came down and advised me that I was being taken to Court that morning for arraignment and they told me that—

Q. Excuse me, for the purpose of the record, do you know who that was that had this conversation with you? A. Well, this Sergeant Little, he was one, and I am certain Billings was one. I was advised that I had better waive preliminary hearing when I arrived in Court and that they had already given us hooziers a lesson up in the Penitentiary.

Q. Now, did they, was there any conversation with any of those officers with respect to your telling anyone about what happened there? A. At anytime you mean while I was in O Hall?

Q. No, lets say while you were even over at the shack, did any of the officers say anything with respect to whether or not you could tell anybody what happened? A. No, sir.

Q. All right. Did any of them at anytime tell you, have any conversation with you with respect to telling anybody what they had done to you there? A. Yes, sir. They told me that I had better never divulge being hung up, because the Federal Bureau of Investigation would come around and investigate it and I would be casting a reflection upon them, and that they had ways of taking care of me later on, if I did divulge it.

[459] Q. Now, did you go, did you go over to the arraignment? A. Yes, sir, I did.

Q. What happened there? A. Well, myself and six co-defendants appeared in Court and numerous officers of the St. Louis Police Department and Highway Patrol had already threatened and told us in various words that we had better waive preliminary hearing and we absolutely had better waive it, and so we appeared before the Magistrate Judge and I believe the charge was read off, and I immediately requested the appointment of an attorney and Mr. Riley here, he spoke up and he tried to stop me from saying anything, and I even shouted out in the Court Room, and asked to speak to an attorney, because I believe there

was some in the Court Room, and again he stopped me, and I was refused permission to call an attorney.

Q. Now, was this before or after you had been down to Springfield? A. That was before I went to Springfield, immediately after then, five minutes later, I was taken to Springfield.

Q. Now, when you went to Springfield, were you examined by some doctor down there? A. Yes, sir, I was.

Q. And did you tell the doctor what had happened? A. I certainly did.

Q. And tell His Honor, what was your physical condition with [460] respect to your hand, when you got down there? A. At that time my left hand was paralyzed and these three, two fingers were drawing up and I had no movement in my hand whatsoever.

Q. Did some doctor examine that? A. Two of them did, yes, sir.

Q. And did they examine any other bruises on your body? A. Yes, sir, they did.

Q. Did you have some other bruises on your body? A. On my legs where the handcuffs were, and where I had been beaten with sticks and clubs.

Q. And those things, did they put them in the record while you were there? A. Yes, sir, they did.

Q. No further questions.

Cross-Examination by Mr. Riley

Q. Now, where were these bruises? A. On my left hand, right hand also, and on my legs.

Q. Wait a minute, where on your legs? A. Down here near the ankle, on the shin.

Q. How big were these bruises? A. The one on my left hand, I would say it circled the entire part of my wrist, on the right hand was approximately the same.

[461] Q. Where else did you have any bruises? A. On my legs.

COPY BOUND

Q. Where on your legs? A. On my shins.

Q. How did you get the bruises on the two shins? A. Well, I was beaten with clubs there.

Q. Where else did they hit you? A. Well, they hit me all up and down the legs.

Q. All up and clear up all over your legs? A. My legs there, down here and also on my stomach.

Q. Your stomach? A. Yes, sir.

Q. What other part of your legs other than your shins? A. Down near my ankles.

Q. Well, did they hit you all over your legs? A. Yes, sir.

Q. All over? A. Yes.

Q. How hard?

MR. HENNELLY: Object to that, that would be a conclusion.

A. I can't answer that.

Q. Tell this Court how hard they were striking you with this club or whatever they were using. A. I couldn't tell, because of the position I was in, I was being suspended in mid-air at that time.

[462] Q. You were being suspended in mid-air? A. Yes, sir. The greater portion of the pain was in my shoulder.

Q. Were you hit on the back of your legs? A. Well, possibly I was.

Q. Well, were you or weren't you? A. The pain was so intense, that pain from the sticks was minor at that time.

Q. What kind of a stick were they using? A. Seemed to be what they call a stick, ballbat.

Q. How many of them were using them? A. I couldn't say, probably three or four.

Q. Three or four? A. More than two.

Q. Were they swinging hard at it or just bunting? A. They were swinging.

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Q. Swinging real hard? A. Swinging real hard.

Q. Did they hit you about the neck or head? A. No.

Q. Did they do anything at all to your face or head? A. No. (Indicated by shaking head)

Q. You will have to answer, because the gentleman has to record it. A. No.

[463] Q. Have these bruises on your stomach—did you have bruises on your stomach? A. They were bruised, but it wasn't scratched.

Q. Well— A. It was red, yes.

Q. How long did that redness stay there? A. At least a couple of days, I don't remember just how long it was.

Q. It was there a couple of days? A. Yes, sir.

Q. Now, how many days do you say that you stayed in O Hall without anything to eat? A. I got put in there on the 27th and I didn't have anything to eat until the morning I started to leave on the 29th.

Q. What time were you put in there on the 27th? A. Probably 12:45.

Q. What time did you get out on the 29th? A. About eight o'clock in the morning.

Q. All right, you would have had to stay in there from 12:45 on the 27th until the 29th, that would make it two days, wouldn't it? A. I said about two days.

Q. On your direct examination, didn't you just say you was put in O Hall for three days without anything to eat or drink? [464] A. I said I got out on the third day.

Q. Didn't you just before that say you were put in O Hall for three days without anything to eat or drink? A. I said we got out on the third day Mr. Riley. If I did say the other, that is what I meant, we got out on the third day.

Q. Then it wasn't three days, it was less than two days? A. It was on the third day, anyhow.

COPY BOUND

Q. Now, how many men were in the classification room on the morning of the 24th, that you were questioned? A. I would say there were fifteen.

Q. Fifteen? A. Yes, sir.

Q. Who were they? A. Well, at that time, I didn't know any of them, their names, except one.

Q. Who was that? A. Sergeant Olin Curtis.

Q. Who? A. Olin Curtis.

Q. Who is Olin Curtis? A. He is a member of the State Highway Patrol.

Q. From where? A. Kansas City, Missouri, I believe.

Q. Who else? A. At that time he was the only one that I knew. Later on I learned some of the others' names.

[465] Q. Who were they? A. Lieutenant Barton, Nash, Inman, Barkley.

Q. What about Caldwell? A. He was there.

Q. What about Little? A. I don't know about Little. I think he was there though.

Q. You said he was there a while ago. A. I am pretty certain he was there.

Q. Now, that is seven, who were the other eight? A. I never did learn their names.

Q. Were they Patrolmen or Policemen? A. I—

Q. And which were they? A. I don't know the rest of their names.

Q. I asked you which—

THE COURT: He asked you whether they were Patrolmen or Policemen.

A. They were Highway Patrolmen.

Q. All eight of them? A. The ones that I just named.

THE COURT: He is asking you about the ones you didn't know.

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A. During that first interrogation in the classification room, I don't recall any St. Louis Policemen. I did see some City Policemen around.

Q. When are you talking about, in the room? [466] A. I don't recall any in the room.

Q. Well, you say you were questioned twenty-five times in your cell on Death Row? A. Well, it was like this Mr. Riley, approximately every hour there would be a group of officers patrol in front of the cell, and each group of officers, some of them missed, but several groups would stop in front of my cell and interrogate me about this crime.

Q. Did they come inside the cage? A. No, they was on the outside of the second set of bars.

Q. Who was celling on the east side of you? A. East side of me?

Q. Yes. A. Nobody.

Q. Who? A. The shower was on the east side.

Q. What? A. The shower was on the east side.

Q. Who was celling on the west side? A. Heaton.

Q. And who else was down there? A. There was Hawkins, Reece and Ducker.

Q. Now, these Patrolmen were questioning you from outside of the cage, and these other inmates could hear them, couldn't they?

MR. HENNELLY: Object to that being a conclusion on the part [467] of this witness.

THE COURT: What tone of voice did they use? A. They used an ordinary tone to begin with, they would start out in a reasonable tone of voice, but usually end up by making a threat to me.

Q. Now, how do you know it was twenty-five times? A. I only estimated that.

Q. Now, who was the Patrolmen, or who were they? A. I don't know their names.

Q. Have you ever seen them since then? A. Possibly I have, most likely I have.

Q. What is that? A. Most likely I have seen them since then.

Q. Well, where have you seen them? A. There was several of them around the Penitentiary for quite a few days after the riot.

Q. Well, I mean, were they, did you see them around there after the 27th? A. After the 27th?

Q. Yes. A. Yes, I seen them there after the 27th. I seen them after the 29th. That is in O Hall.

Q. After the 29th? A. Yes, after the 29th, I was not in the prison.

Q. Then you couldn't have seen them after the 29th? A. I didn't say I seen them after the 29th.

[468] Q. Now, what was this rope that lifted you up, what was it on? A. It was a web partition separating this room from another room, and I know that the end of this rope was tied into the web partition, and it was extended up to the top of the roof.

Q. Suspended in the top of the roof of that recreation or field house? A. Yes.

Q. And what was it suspended in up there? A. I never did look directly up there Mr. Riley. When I was hanging in that position I doubt if a man could look straight up.

Q. If you had looked, would you have been surprised to know that that was a celatex ceiling and no rafters there?

MR. HENNELLY: Object if Your Honor please, to the form of the question, it is argumentative and a statement.

THE COURT: Sustained.

Q. Did you know that that is a solid ceiling without rafters showing? A. I know I was hung up down there Mr. Riley, and I know it was near that web parti-

tion, because one time I put my feet on that web partition and one of the officers got between that and myself. In fact, I would be willing to demonstrate to you right here in this court room how I was [469] hung up, and the demonstration there would also show you how my arm became paralyzed and deadened.

Q. Is this Exhibit 16 and 16-1 in your own handwriting? A. Yes, sir.

Q. I think that is all.

MR. HENNELLY: Come down.

M. E. CURTIS,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Hennelly

Q. Give His Honor your name please. A. M. E. Curtis.

Q. Where do you live Mr. Curtis? A. Springfield, Missouri.

Q. What is your business or occupation? A. I am records clerk at the medical center for Federal Prisoners at Springfield, Missouri.

Q. What are your duties as medical clerk down there? A. I maintain the records that are compiled at the Institution on all inmates.

Q. Do you maintain and keep the records of all people who have been quartered at the prison? A. Those that are committed there.

Q. And do you keep those records in the normal course of business? A. I do.

[470] Q. And pursuant to a subpoena duces tecum which His Honor issued out of this Court and which was served on you sometime ago, did you bring with you a record of one James Stidham? A. I did.

Q. Mark this Exhibit E.

Reporter marked Exhibit E, record of hospital at Springfield.

MR. RILEY: If he is going to take part of it out, I would rather he would now, I wouldn't even know how to object to all of that.

MR. HENNELLY: It hasn't been offered yet.

MR. RILEY: Have you got it all marked?

MR. HENNELLY: I am going to have it marked E-1, E-2, and E-3.

Reporter marked E-1, a sheet in the file of James Stidham at Springfield.

Reporter marked E-2, a sheet in the file of James Stidham at Springfield.

Reporter marked E-3, a sheet in the file of James Stidham at Springfield.

Q. Now, Mr. Curtis, I am going to hand you what has been marked at this point for the purpose of identification, Defendant's Exhibit 1, would you tell his Honor, Judge Weber, what that is? [471] A. It is a consultation sheet prepared by Dr. Hatcock on September 30, 1954.

Q. Who is Dr. Hatcock? A. He is the doctor regularly assigned to the Institution at Springfield.

Q. Is Dr. Hatcock still assigned to Springfield? A. He is.

Q. How do you spell that? A. H-a-t-c-o-c-k.

Q. And that handwriting, do you recognize that as Dr. Hatcock's handwriting? A. I do.

Q. And that—is that a record that is kept in the normal course of business? A. It is.

Q. And is that one of the records, which are the Official Records of your Institution? A. Yes, sir.

Q. And you are the Official Custodian of that record? A. Yes, sir.

Q. I offer this in evidence.

MR. RILEY: Isn't Dr. Hatcock here?

MR. HENNELLY: He is in town. He has been subpoenaed as a witness here and is here. He is on the way from the hotel.

MR. RILEY: If he is coming and going to identify this, I have [472] no objection to it.

THE COURT: Let me see it.

MR. RILEY: I want the doctor here, and he has been subpoenaed, and I want him here to testify.

MR. HENNELLY: He will be here. I represent to the Court that he will be here.

THE COURT: All right, it will be received for the purpose of—can it be left, well it is part of this file.

MR. HENNELLY: They will go back and send a photostatic copy to the Reporter, won't you? A. Yes, sir.

MR. HENNELLY: That is what they have done in all the other trials.

Exhibit E-1, having been received in evidence, but the Reporter not having been furnished a copy of same, same is not copied into this transcript at this time.

MR. HENNELLY: Now, I want you to look, if you will, at that which has been marked for the purpose of identification as Defendant's Exhibit E-2 Mr. Curtis, and tell His Honor what that is? A. It is the initial physical examination prepared by Dr. F. L. Halleck, on September 29, 1954, at approximately 3:05 P.M. on September 29, 1954.

Q. And is that sheet and that Exhibit in reference to one James Stidham? [473] A. It is.

Q. And is that part of the Official Records of your institution? A. It is.

Q. And are those the records which are kept in the normal course of business and in your custody and control sir? A. It is.

Q. Who signed that sheet of paper? A. Dr. F. L. Halleck.

Q. And I will ask you at this time what was Dr. Halleck's position with your institution? A. He was an individual assigned to medical staff, Medical Center.

Q. Is he at this time still in the State of Missouri or attached to your institution? A. Not in the State of Missouri and not attached to our institution.

Q. At this time Your Honor, I offer Exhibit E-2.

MR. RILEY: We don't have any objection at this time, but reserve the right to object at any other time it is offered.

THE COURT: Whose handwriting is this in, if you recognize it? A. Dr. Halleck's.

Q. You know his handwriting? A. Yes, I do.

[474] THE COURT: All right, it may be received in evidence for the purpose of this hearing at this time.

Q. I am now going to show you now, which has been marked for the purpose of identification as Defendant's Exhibit E-3, and I am going to ask you what that is sir? A. It is Record Form 9, commonly called the Marshal's receipt, indicating that we accepted, you want the names read?

Q. Is Stidham's name on that sheet? A. Stidham from the custody of the Missouri State Penitentiary, on September 29th, 1954.

Q. I am going to ask you, does that indicate anything else but the receipt of the custody of the Defendant Stidham? A. Yes, it shows our institution number, Missouri State Institution number and height and weight of the individual.

Q. Shows his height and weight, is that right? A. Yes, sir.

Q. Now, is that the record which is kept in the normal course of your business down there sir? A. It is.

Q. One of the official records of your institution? A. Yes, sir.

Q. And you are custodian of those records, and they are kept under your custody and control? A. Yes, sir.

[475] Q. At this time Defendant will offer Exhibit E-3 Your Honor.

THE COURT: It may be received in evidence.

Exhibit E-3, having been received in evidence, but the Reporter has not been furnished a copy of same at the time of preparing this transcript, and same is not copied into this record.

MR. HENNELLY: This being one of the things that I don't think they do have photostats of, I think this is a very short thing that I could probably put into the record. A. There is a photostat already made.

Q. Would you tell His Honor what that shows to be the height and weight of the Defendant at the time that he went, he entered your institution? A. Weight 160 pounds, height 68 inches.

Q. Thank you. I have no further questions of this gentleman.

MR. RILEY: You are going to stay here?

A. Yes.

MR. RILEY: I don't have any questions.

THE COURT: Are you going to use the doctor at this time?

MR. HENNELLY: Yes.

DR. THOMAS A. HATCOCK,

BEING SWORN, TESTIFIED:

Direct Examination, by Mr. Hennelly

Q. What is your name please? [476] A. Thomas A. Hatcock.

Q. What is your occupation or profession sir? A. Physician.

Q. And where do you reside sir? A. And surgeon. U. S. Medical Center in Springfield, Missouri.

Q. Of what school or schools are you a graduate Doctor? A. Duke University and Vanderbilt University.

Q. When did you graduate from Duke? A. 1929.

Q. And was that your undergraduate work at Duke? A. Yes, sir.

MR. RILEY: We admit the Doctor's qualifications.

Q. Doctor, did you make an examination of the Defendant in this case, James Stidham? A. I did.

Q. I will ask you what were the Defendant's complaints at the time that you examined him?

MR. RILEY: Object to what the Defendant's complaints were, they are hearsay so far as his complaints are concerned, and are self-serving.

MR. HENNELLY: Offer it as the ground work for a hypothetical question of the Doctor, whether or not that condition the doctor found could have been caused by—

THE COURT: You can propound the hypothetical question based [477] on any evidence that may be in the record, but for the doctor to testify, would be hearsay. He may testify as to his physical findings, and you may propound a hypothetical question to him.

Q. Tell the Court what your physical findings were at the time you examined Mr. Stidham? A. It should

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be made clear to begin with, that I was asked to see this man in reference to a specific complaint.

Q. What was that complaint? A. Again, numbness involving the fingers of his left hand.

Q. And what was the date upon which you made that examination Doctor? A. I will have to look, go to the record, latter part of September, last year, but the record—

Q. You may examine the record. A. The record indicates on the 30th day of September.

Q. 30th day of September? A. Yes, sir.

Q. What did you find at that time? A. Shall I go by memory?

Q. You may refresh your memory and then— A. In following up the man's complaint, weakness of the left ring and little fingers, I noticed that he did have a loss of strength in those fingers. There was a partial loss of sensation. He described a feeling of numbness involving [478] these two digits and on testing him, the function of these two fingers appeared, the muscles appeared to be weak.

Q. Now Doctor, did you, what—were there any other physical findings? A. Not on any examination. Inasmuch as I examined him for this condition alone, I did not make a general physical examination.

Q. Now then Doctor, where is the ulnar nerve? A. The ulnar nerve of course arises up in the neck level of your spinal cord.

Q. And what is the lower extremity of the ulnar nerve Doctor? A. Well, it extends down the forearm and down to the hand and supplies the side of the hand and the last two fingers, I mean the small and ring fingers.

Q. Doctor, it does pass through the wrist, doesn't it? A. Yes, sir.

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Q. All right. Now then Doctor, assume if you will that on the night, or sometime during the 27th of September, 1954, the patient that you examined at that time was strapped, rather was handcuffed with a pair of handcuffs on his back, with his hands to his back, and assume further that he was handcuffed by the legs, and that he was, a rope was attached to those handcuffs and that he was suspended some distance from the ground, that the first instance was for a period of [479] fifteen minutes, and that sometime later he was again put up for a period of approximately half an hour, and during these times his weight was not on the ground, but that he was suspended in the air, would you say Doctor, based upon reasonable medical certainty, and upon your experience as a Doctor, that such a condition which you found when you examined Mr. Stidham, at the time you examined him, could have been caused by that hanging? A. I would.

Q. No further questions.

Cross-Examination by Mr. Riley

Q. Now Doctor, did you find any evidence of any bruises on his wrists at that time? A. Not on his left wrist. There was an old scar in the palm.

Q. Now Doctor, assuming that all that is true, as set out in the hypothetical question, wouldn't you think that such would leave a scar or abrasion of some kind on his wrist? A. No, I would not.

MR. HENNELLY: Object to the form of the question, even though the Doctor is qualified, I think that is too vague, indefinite and uncertain.

THE COURT: Well, he has referred back to your question, referred the Doctor to your question, and asked him whether [480] such would leave scars or bruises on the wrists. The objection is overruled.

Q. Doctor, do you know what handcuffs are made out of, you have seen a lot of them, haven't you? A. Yes, sir.

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Q. If a man hung up by these handcuffs, wouldn't that leave some abrasions or bruises on the skin of his wrists? A. Well, that would all depend. I can't say yes or no to that.

Well, it depends on how much pressure was put on these things, and how the pressure was distributed.

Q. Now, if he was just roped, a rope was run through the handcuffs and he was raised up off of the ground as Mr. Hennelly asked you, wouldn't that leave some bruises or abrasions or something on the skin? A. It could, but I wouldn't be willing to say that it would have to in every case.

Q. Then you mean to tell the Court that without leaving any bruises or marks whatsoever on the skin that would still damage the nerve enough to paralyze the two fingers in the hand? A. Yes, as a matter of fact, I wouldn't guess that the nerve was injured at that level. The nerve happens to be quite superficially located at the elbow level and that is the site of the injury or contusion resulting in this kind of [481] findings.

Q. Then you are not telling the Court that the injury to that wrist was caused by that, the paralyzing? A. I am not.

Q. If there was such an injury, it would be up about the elbow? A. That is the area where the ulnar nerve is most prone to be contused and injured.

Q. And did you make an examination of the elbow area? A. I did.

Q. And you didn't find anything there? A. No.

Q. Now Doctor, in Dr. Halleck's report on the 29th at 3:05 P.M., you have that there don't you? A. Yes, I think there is a copy here.

Q. Now, in Dr. Halleck's report, he says the patient has however, an old large scar over—I can't read it. A. Hypothena imminence.

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Q. Where is the hypothena imminence? A. It is that area at the base of the palm on the small and little finger, side prominence at the base of the palm.

Q. And which Dr. Halleck said could account for the difficulty, meaning the stiffness in the little finger? A. That is what he reports.

Q. Now, did you, when you examined him on the 30th, you didn't [482] see that scar did you? A. I saw it. I made no report in the record about it. I didn't consider it significant at all.

Q. Well now, is it your opinion that that scar had nothing to do with the condition of his finger? A. It is.

Q. And then Dr. Halleck was mistaken in his opinion? A. That was merely an opinion.

MR. HENNELLY: I think that is argumentative and I don't think this distinguishes—

Q. I will clear it up. Were you Dr. Halleck's superior? A. Yes, sir.

Q. Then Doctor, from what you have told us about the nerve up near the elbow, how can you say that the man being hung up by his wrists, would damage his fingers? A. Well, in any, even a minor struggle of any kind, the ulnar nerve is very susceptible to injury by contusion at that level, and it doesn't necessarily have to be by superficial scar at all, or a bruise or discoloration. It is a very sensitive area. It is called the funny bone. That is the ulnar nerve in the bony prominence at that point, and it is very prone to injury.

Q. But the hypothetical question that Mr. Hennelly put to you had to do with being hung up by the wrists? A. Yes, sir.

[483] Q. Well, how could you conceive of being hung up by the wrists damaging the elbow? A. I don't conceive of anyone being hung up in such a manner, espe-

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cially as the patient told me, with his hands tied behind him and against the rail or bars.

Q. Now, in the hypothetical question, nothing was said about rails or bars. A. Well, it is my opinion that the things that were described there, could very well lead to this type of injury.

Q. Sir? A. It was my opinion, if I may quote from my notes, that the results here were probably due to a contusion of the ulnar nerve.

Q. All right. I could take my elbow and hit it right like that, by hitting my funny bone and paralyze my fingers, couldn't I? A. You could.

Q. That is all.

Redirect Examination by Mr. Hennelly

Q. Doctor, would you tell his Honor, indicating on me if you can, the line of the ulnar nerve? A. The ulnar nerve, for simplicity's sake, beginning at the elbow level, follows through the groove as everyone knows, and the funny bone, and passes down in the nuclear portion [484] of the forearm, and passes, gives off branches to the muscles of the forearm, and passes on down into the wrist through the midportion, and gives off its major branches to the little and ring fingers.

Q. Now Doctor, where does it go from underneath this point here? A. It goes into the muscles.

Q. I see. Is the ulnar nerve at any position above the elbow? A. Oh, yes.

Q. All right. Tell His Honor, where that goes to? A. It comes through the muscle structure of the upper arm into the, in through the arm pit and I say goes that way, actually it comes from the spinal cord at the neck level, and it is made up of a number of branches of nerves coming out at different levels of the spinal cord. It forms a trunk or becomes localized in a group of nerves and

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passes down through muscular portions of the upper arm and of the elbow through the funny bone area.

Q. Now Doctor, if a man's arms were tied in back of him, in the method which I previously described to you in the hypothetical question, and the arms held back in that position, I am going to ask you if there couldn't be sufficient contusions, either, first of all to the wrist area in which the ulnar nerve passes, or to the upper extremity of the general [485] path of the ulnar nerve, to cause a partial paralysis of the complete lower extremity of the ulnar nerve in the two small fingers, could it be done? A. Yes.

Q. No further questions.

Recross-Examination by Mr. Riley

Q. Just by pulling? A. By pulling or twisting, or it doesn't have to be a contusion.

Q. Doesn't have to be a contusion? A. Doesn't have to be a definite blow on the nerve. It can be twisted so it is impinging against the bony prominence and cause the same effect as by direct contusion.

Q. But you didn't see any bruises on his wrist, did you. A. No.

Q. Well Doctor, is it likely or probable that the ulnar nerve would be damaged by twisting? A. It happens frequently.

Q. That is all.

MR. HENNELLY: That is all. That is the Defendant's Motion Your Honor.

THE COURT: Now, at the conclusion of the hearing held otuside of the hearing of the Jury, the request by the Defendant for a hearing upon the statement which has been identified as—

[486] MR. RILEY: 16 and 16-1.

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THE COURT: 16 and 16-1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted, so we may proceed with Sergeant Little, as to his identification before the Jury of the statement in question, Exhibit 16 and 16-1.

MR. HENNELLY: In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?

THE COURT: That is right. Mr. Sheriff will you bring the Jury back in?

SERGEANT LITTLE,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Sergeant, prior to the time that the Defendant Stidham made any statement, either oral or written, did you or did anyone in your presence promise him anything? [487] A. No, sir.

Q. Did you or anyone, did anyone in your presence threaten him with any force, violence or anything in order to get him to make a statement? A. No, sir, we did not.

Q. Did you or anyone in your presence, hit him, strike him or beat him? A. No, sir.

Q. Did anyone offer to the Defendant Stidham any physical violence whatsoever? A. No, sir, they did not, in my presence.

Q. Well, you saw him come in the room and leave, didn't you? A. Yes, I am pretty sure I saw him come in. I am pretty sure I was there when he came in. I know I saw him leave.

Q. Now, as best you can recall Sergeant, will you tell the Court and Jury just what the Defendant Stidham said about the death of Walter Lee Donnell?

MR. HENNELLY: At this time, if Your Honor please, the Defendant will object to any statement which was made at that time, and under those circumstances, for the reason that any statement which was made was made while the Defendant was in technical custody, and deprived of his Constitutional Rights, and to admit any statement would be a violation of the Constitutional Rights of this Defendant, under both the State and Federal Constitutions.

[488] THE COURT: The objection is overruled. Go ahead.

Q. Go ahead Officer. A. I am not sure that I remember everything that is in his statement. I remember though some of the things. I remember him saying that he was in Death Row, confined in Death Row at the time of the riot, and that he heard a lot of confusion and noise going on, which was the breaking into Death Row by the convicts who were engaged in the riot.

Q. Sergeant, you don't get my question, I mean did he make any oral statement in addition to what— A. In addition to this?

Q. Yes. A. I thought you were asking me to try to relate all that was in that statement.

Q. No. A. Yes, there was some—

MR. HENNELLY: May I augment that objection to include also the fact that this is, there is a written statement and that the State is bound by the written statement, and that this is an attempt to alter and to vary the terms of a written statement?

THE COURT: Well, come up here just a minute. (Out of the hearing of the Jury)

MR. RILEY: If the Court please, any admissions against interest is admissible against this defendant.

THE COURT: Yes. Now, you are asking this witness for statements [489] in addition to anything that might be contained in Exhibit 16 and 16-1?

MR. RILEY: Yes, sir, as an admission against interest.

THE COURT: Let's see, has the witness identified 16 and 16-1?

MR. RILEY: Yes.

THE COURT: And testified it was in the handwriting of the Defendant, I mean before the Jury?

MR. HENNELLY: He has done that.

THE COURT: And he has testified as to the Defendant's signature there too. I think that I would rather—I believe the objection will be overruled, but I believe that the witness ought to testify at this time, he should be asked the method by which this statement was obtained.

MR. RILEY: I thought we had.

THE COURT: I don't believe you have before the Jury.

MR. HENNELLY: I think he did Judge.

THE COURT: There has been so much testimony here, I know he has testified before the Court as to that. I don't believe the method of taking the testimony was—now wait a minute, he did tell who was there, but he didn't go into just how it was taken, and I think I would rather you would go into that first, so I will sustain the objection at this time.

MR. RILEY: (Back before the Jury) Sergeant, will you state to the Jury just how this statement was taken, or how it was made by the Defendant? [490]

A. The statement was made, the written statement was made by the defendant after he had made an oral state-

ment, which was somewhat similar to this, to the written statement.

Q. Now, who was questioning the defendant? A. I believe that Lieutenant Eitzman was doing that, that is the St. Louis Police Officer was doing the most of the questioning, the actual questioning. I think that it is probable that one or two other officers including myself, and Caldwell, injected some other questions into that general line of questioning, but Lieutenant Eitzman was actually handling the majority of the questioning.

Q. Now, did the Defendant write this statement in his own handwriting? A. Yes, sir, he wrote that statement after making an oral statement, which was something similar to that.

Q. And did you or anyone else tell him what to put in the statement? A. No, sir, there was no one told him what to put in the statement. We did, I did, I think follow along as he was writing it pretty well, and I did attempt to get it, to get him to put it in there in the proper sequence, following in the chronological sequence, and I also asked him to write in that opening sentence in there, in which he identifies himself.

Q. Now, he was asked to put that in there? [491] A. The rest of it was written in as he saw fit to write it himself.

Q. You didn't dictate it to him? A. No, there was no dictation, not even the first sentence was dictated, I told him that I wanted him in the first sentence, or the first paragraph, to identify himself.

Q. And this statement contains his own choice of words? A. The wording is his own.

Q. And the events and other matters mentioned in the statement are Stidham's own words? A. Yes, sir, that is his own words of what he says happened, with relation to the killing of Donnell.

Q. And it isn't what you say happened, is it? A. No, it is not.

Q. What is in that written statement is what Stidham wanted to write?

MR. HENNELLY: I certainly object to that as being a conclusion, object to the form of the question Your Honor and think it is invading the province of the Jury.

THE COURT: Well, the use of the word "wanted" may be stricken. The witness may be asked if it is what the defendant did write. The question of the voluntariness, etc., would be a question for the Jury. The objection will be sustained to the last question asked.

Q. All right. Did you or anyone else in any way cause, or make [492] Stidham put anything in that written statement that he didn't put in himself? A. Only that sentence that I referred to, that first sentence which was the, I think that identifies him as being the writer of this statement, but as to the facts contained therein, those things that pertain to the actual killing of Donnell, and the circumstances surrounding that, that is all his own story in his own handwriting, and in his own phraseology. That was not dictated to him.

Q. Now, in addition to what is contained in the written statement, did Stidham make an oral statement? A. Yes, he did.

Q. Will you tell the Jury just what statement was made, what happened? A. There is some things about the oral statement that I am not sure that I can talk from, exactly accurately from memory, but he made some remarks, or he made a statement similar to this in response to questions.

MR. HENNELLY: Your Honor, I am going to object for the reason that it is not responsive. I think the question is asking for the circumstances under which the oral statement was taken. I think this statement includes the substance of the oral statement.

THE COURT: He has asked him—the question was, what was the oral statement.

[493] MR. HENNELLY: Then may the record reflect that I renew the objection which I heretofore made and which Your Honor ruled upon heretofore?

THE COURT: The objection is overruled.

A. The oral statement that was made, was in response to direct questions by Lieutenant Eitzman and others, and was substantially the same as in the written statement. I can remember one thing in particular that I find is not in the oral statement, that is not in the written statement, that I can recall, was in the oral statement.

Q. What is that? A. That was a remark that, as I recall it, was made in response to a question by Trooper Caldwell, in which Caldwell asked him why all this took place, or why he was mad at Donnell, and—what is his name, I mean Creighton, and I can remember that the Defendant said that as far as Creighton was concerned, he was mad at him and wanted to kill him and would kill him if he ever had a chance, because he just didn't like the old son-of-a-bitch.

MR. HENNELLY: Your Honor, I ask that that be stricken and the Jury instructed to disregard it and a mistrial declared for the reason that is not an admission against interest with respect to this case, and for the further reason that it was not responsive to the question.

THE COURT: Of course the Exhibit 16 and 16-1, hasn't been [494] introduced in evidence, but the Court has read it in connection with the previous testimony, so in view of that the objection will be overruled.

Q. Confine your remarks to Donnell, if you will. A. Then he said with reference to Donnell, that the reason that he was mad at Donnell was because of the fact that Donnell was a snitch and had caused a lot of people

a lot of trouble in the Penitentiary, something to that effect. I don't remember the exact wording. I believe that is all I recall that was said in addition to the written statement.

Q. How long was Stidham down there in the field house? A. I think that it was probably between an hour and an hour and a half. I don't know the exact time.

Q. I believe that is all.

Recross-Examination by Mr. Hennelly

Q. Sergeant, what time did you first see the Defendant on the day in question? A. I think it was between eleven and eleven-thirty to the best of my memory.

Q. And you say that he was in there for about an hour and a half, an hour or hour and a half? A. Something between an hour and an hour and a half.

Q. Now then, I am going to ask you, when he arrived, was he handcuffed? [495] A. I am pretty sure he was.

Q. And were there some officers with him? A. Yes, I am pretty sure that he was brought down there by Trooper Caldwell, and a member of the St. Louis Police Department.

Q. Now, what was the name of this place that this questioning was conducted in? A. I believe that in most of the conversation I had about it, we called it the field house.

Q. An athletic place, was it? A. Yes, sir.

Q. This wasn't this same place, which I will show you on State's Exhibit 11, was it? A. No.

Q. This was what you called a field house? A. Yes.

Q. Now, how far was that away from the main building? A. From B and C Hall it is, I think maybe five or six hundred feet from B and C Hall.

Q. And I will ask you Sergeant, tell His Honor and this Jury what kind of furniture was in the room in which this interrogation was conducted. A. In the field house it is, there is a large room which was the only room that we used. There were a couple of adjoining rooms to that that were not used by us, but in the [496] room used by us, a rather large room, that contained, as I remember it, a table, something the size of that one as the counsel table there, and probably three or four or five benches up against the wall and some chairs. I don't believe there was any other furniture in the room.

Q. Now Sergeant, was this interrogation conducted in the center of the room or up against the wall, or where was it? A. Well, this table was down toward one end of the building I believe.

Q. And Sergeant, were all of you gentlemen armed? A. I suppose so. We were practically, well all the time up there.

Q. Did you have any additional sidearms on you during this time? A. I think that the officers who were bringing the prisoners backwards and forwards down there were probably armed with shotguns or rifles, and it is possible that some of the rest of us may have had, I don't recall about that, I am sure that we all had sidearms, but whether we had additional weapons, I am not sure.

Q. How was the defendant dressed when he first came into that room? A. He was in ordinary prison uniform.

Q. Can you tell us Sergeant the dimensions of that room? A. I think the room is about twenty feet by thirty feet.

[497] Q. Twenty by thirty? A. Yes, sir.

Q. And do you know how high it was to the ceiling? A. No, maybe eight feet, I believe.

Q. About eight feet? A. Yes, sir.

Q. Now then, I am going to ask you, when the Defendant was first questioned with respect to whether or not he had anything to do with the murder of Walter Lee Donnell, I am going to ask you if he didn't tell you and Lieutenant Eitzman and other people who were there that he didn't have anything to do with it? A. I think that at he first denied any knowledge of it.

Q. Can you tell this Court and Jury how long he said that he didn't have anything to do with it? A. Well, assuming that he was in there about an hour and a half, I would think that probably half an hour of that time he claimed that he didn't have anything to do with it.

Q. Now, during that half hour, did anybody threaten him or did anybody injure him or harm him in any way? A. No. sir.

Q. And then the defendant changed his mind and then he made a different statement and admitted some complicity in the thing, is that right? A. Yes, sir.

[498] Q. But you didn't have to do anything to him, did you? A. No, sir.

Q. All right. Now then, I am going to ask you Sergeant, was there a rope in that room? A. Not that I know of.

Q. Could there have been one that you didn't see? A. I don't think so.

Q. Did you at anytime while you were there, see this Defendant with his arms behind him and pulled up and suspended with his feet about six or eight inches off of the ground? A. No, sir.

Q. Now Sergeant, isn't it a fact that it was only after that, that the defendant changed his story and said, I will say whatever you want me to say? A. No, sir, that is not right.

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Q. That is not right? A. No, sir.

Q. He just did it, he went along for half an hour denying it, and then he said, then he went on and told, is that right? A. Yes, sir.

Q. All right. Now then Sergeant, you know who did the questioning? A. Lieutenant did most of the questioning.

Q. Did you ask any questions? [499] A. Yes, sir, I think I did.

Q. And were all of you seated around this table? A. Well, I couldn't say that they were all seated around that table, no, sir. I don't think they were.

Q. I will ask you, I am sorry, are you through Sergeant? A. Yes, sir.

Q. Did you at anytime while you were there, see the Defendant, his legs handcuffed or manacled? A. No, sir.

Q. Did you see any officer put a coat around him and put him down in that chair? A. No, sir.

Q. Nobody did a doggoned thing to him while you were there? A. He wasn't abused, no, sir.

Q. All right. Now then, I will ask you Sergeant, how long did it take him to give what you refer to as the oral statement? A. Oh, I think that was probably ten or fifteen or twenty minutes involved in conversation in which he was admitting the things that are in this written statement. That was before the writing started.

Q. And now Sergeant, you have indicated that the first sentence in that, which has been offered into evidence as State's Exhibit 16 and 16-1, that the first sentence was what you told him to put in there, is that right? [500] A. No, sir, it is a little hard to explain that, but I didn't exactly tell him, or dictate that first sentence to him. I told him what I wanted him to put in the first sentence, but I didn't dictate it word for word.

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Q. Sergeant, I want you to tell me what is the last word of the first sentence that you are referring to, the last word, just the word Sergeant? A. I will have to study this a minute, because there is not a period in there where I think the end of that part which I asked him to write was. I believe that the end of the part was Death Row.

Q. All right. Now then Sergeant, were you seated right down next to him? A. I was sitting across the table from him.

Q. Across the table? A. Yes, sir.

Q. Well, I understood that you had at least counseled with him in such a way that it would follow in the sequence that you wanted, isn't that right? A. Yes, sir.

Q. And would you then look at what he has written and suggested or implied that he should then take up another line of inquiry? A. No, as he was writing it he was stating it out loud to us.

[501] Q. He was sitting across, you were seated across the table and then he was writing it and saying it out loud, is that right? A. Yes, sir.

Q. Then what would you say to him? A. If I may have a look at that, I think I can explain what I am trying to say.

Q. Don't refer to anything that is specifically in there Sergeant, because it hasn't been offered in evidence yet. A. After that part of it which I said had to do with the identification of him?

Q. Yes. A. Who he was and where he was from and the fact that he was in the prison?

Q. Yes. A. Then I think a remark was made, well go ahead and start at the beginning of the riot, the first thing you knew about the riot, and write down about that.

Q. Now, how many times during the course of the time that that was being written did you have to interject some suggestion in order that it would be kept in the proper order? A. I don't recall after he once started on that part of the statement, of ever having to do anything further in the direction of the sequence. I don't remember anything further.

[502] Q. Well then, when you told His Honor, Judge Weber, and this Jury, that you had to tell him how to write it so that it would be kept in the proper order, you were only referring to one time, is that right? A. No, I am not too definite about that. I can remember of talking about the starting of that statement which has to do with the riot itself, and it may be that further on down in there I may have said something to him to get him back onto the path, I don't remember. I am just not sure about that.

Q. Did you ever tell him to scratch anything out and to start on some other line? A. No, sir, I don't believe so.

Q. You don't think so? A. No.

Q. Now then, can you give His Honor and this Jury any idea of what time the Defendant began writing that statement? A. Well, to the best of my memory, I would say it was somewhere between twelve and twelve-thirty. I do not remember the exact time.

Q. Can you give us any idea of the length of time consumed in writing the statement, both pages? A. I don't think it was over, not over half an hour consumed in the writing of the statement.

Q. Now, if you were seated, were you seated directly across [503] from this man? A. Yes, sir.

Q. And if I understand correctly Officer, the table which was used was a table about the size of the counsel table, is that right? A. Yes, sir.

Q. Now, where was Sergeant, Lieutenant Eitzman sitting? A. Sergeant Eitzman was sitting at, as I recall

it now, he was sitting at another corner of the table. May I explain it this way, that I was sitting in a position similar to where you, the defense counsel are sitting, and the Defendant was sitting across the table from me in a position somewhere near where Mr. Riley is sitting and Lieutenant Eitzman would have been sitting back at the corner on the same side of the table I was on, but on the other end of the table.

Q. All right. Now, was there anybody else at that table? A. I can remember that Trooper Caldwell was sitting at the far end of the table, and I am not sure where these other officers were seated around there part of the time, probably not right at the table, but there were other benches around near the wall.

Q. What were, were any of the other people besides you and Lieutenant Eitzman doing anything? A. Well, they was, several questions that may have been asked by these other people. I just don't remember. I remember [504] Sergeant, Trooper Caldwell asking a question, but I can't remember specifically of any of the St. Louis Policemen asking questions. They might have.

Q. Was anybody writing anything down besides the Defendant? A. Caldwell was taking notes.

Q. Now then, after the Defendant was through, finished writing, was he manacled and again handcuffed again? A. Well, he was when he was taken out.

Q. And was he, during this first interrogation when the oral statement was given, was he handcuffed then? A. I think he was handcuffed until the time that he started the writing.

Q. Do I understand your testimony to be that in his oral statement he told you that the reason that he wanted to kill Donnell was because Donnell was a snitch, or an informer or something like that, and that he had talked on some other people, and those people had gotten into some trouble, was that your testimony? A. Yes, sir.

Q. And he thought that that sort of thing was so bad, that that man should have been killed, or words to that effect? A. That is why he said he wanted to kill Donnell.

Q. Anybody—strike that. I have no further questions Your Honor.

[505] *Redirect Examination by Mr. Riley*

Q. Sergeant, did you see the Defendant Stidham sign that statement? A. Yes, sir.

Q. And did you sign it as a witness? A. Yes, sir.

Q. And did you initial the first page and sign the second page? A. Yes, sir.

Q. That is all.

MR. HENNELLY: No further questions Your Honor.

LIEUTENANT WALTER EITZMAN,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Will you state your name please? A. Walter Eitzman.

Q. Where do you live sir? A. 5435 Christy Boulevard, St. Louis, Missouri.

Q. How old are you? A. Forty-seven years.

Q. And where are you employed? A. St. Louis Metropolitan Police Department.

Q. What rank? A. Lieutenant.

Q. How long have you been with the St. Louis Metropolian Police Department? [506] A. Little over twenty-five years.

Q. I will ask you if you are acquainted with the Defendant Stidham? A. Yes, sir, I am.

Q. I will ask you if on September 27th, 1954, you saw the Defendant Stidham? A. I did.

Q. Where? A. In the field house of the Penitentiary.

Q. Had you ever seen him prior to that time? A. No, not that I know of.

Q. And were you in the field house when the Defendant came in? A. Yes, sir, I was.

Q. Who brought him in? A. Trooper Caldwell and Patrolman Jenneman of the St. Louis Police Department.

Q. Were you there all the time that Stidham was there? A. I was.

Q. I will ask you if at anytime either you or anyone in your presence made any promises of any kind to the Defendant Stidham? A. I did not. I never heard anyone.

Q. I will ask you or anyone else there ever threatened the Defendant? [507] A. I did not.

Q. I will ask you if you or anyone there ever hit him, beat him or struck him either with your fists or a club or any other instrument? A. No.

Q. I will ask you if you ever tied him and hung him up from the ceiling? A. No, sir.

Q. Lieutenant, I will show you what has been marked as State's Exhibit No. 16 and a second page marked 16-1, have you ever seen that? A. Yes, sir, I have.

Q. Where did you see it? A. I saw this when it was written in the field house on September 27th, at about 12:30 P.M.

Q. Who wrote it? A. James Stidham.

Q. I will ask you to tell the Court and Jury just what happened there as near as you can recall it, at the time Stidham came into the room until the time he left. A. Stidham came in and he was brought in rather, about eleven o'clock in the morning, and questioned in reference to the riot, and to the murder which occurred in Death Row, on the night of the riot. And of course at first he denied being down in the cell, in Death Row, and not having any part in the actual murder.

[508] Q. How— A. However, after about twenty or twenty-five minutes of questioning, I had talked to him and explained to him that I had a statement—

MR. HENNELLY: Object to that, and ask that that be stricken and the Jury instructed to disregard it, and a mistrial declared, being hearsay and not binding on this Defendant, and ask that it be stricken, and if Your Honor desires any cases, I will cite the Court some cases.

THE COURT: Well, the witness hasn't said anything as yet. The objection will be sustained as to what this witness told him.

MR. RILEY: This was in the presence of the Defendant.

THE COURT: No, bring your machine up here Mr. Ehlers. (Out of the hearing of the Jury) He never said anything, he said I told him that I had a statement, and I don't know whether he finished the full word of statement or not. I don't know if the Reporter has got it or not. I don't think that the witness ought to testify as to what he told the Defendant about other statements that he may have had. What would be your purpose in showing that?

MR. RILEY: To show why this man decided to quit denying it and then admit it.

MR. HENNELLY: Your Honor, might I say this, the Lieutenant's statement is not binding on this defendant. What this amounts [509] to is hearsay by indirection, and the Montgomery Case indicated the same thing. The substance of such a statement is this, that the other statements, and that the other things which were said by the other co-defendants implicated this defendant and under those circumstances, it is a denial of the Constitutional Rights of this Defendant.

THE COURT: I don't know what this statement that the witness might have testified to might have been, but that is the thing that I am afraid of, is that there may be

some things that he is going to refer to by other statements made by other parties, which would be admissions by other parties that would implicate the Defendant, which would be getting over to this Jury that other people had said that this Defendant did certain things, and that certainly is hearsay.

MR. RILEY: What I think he is going to testify to is that he told this Defendant that he had a statement implicating Stidham.

THE COURT: Yes, other people implicating Stidham. I am not going to permit it, the objection will be sustained and the request denied. Nothing said in this record up to this time by this witness in his testimony that needs to be—that the Jury needs to be directed to disregard. He merely said, I told him I had other statements, and the interruption came at the word, statement.

MR. RILEY: If the Court please, I would like for the Court to [510] caution the witness not to make any reference to any other statements.

THE COURT: I don't remember now what the last question was that you asked him. I am ruling that you shall not testify before the Jury at least at this time as to statements that other prisoners may have made to you which you told or conveyed to the Defendant.

A. Okay.

Q. The question was to tell everything that happened.

THE COURT: Lets go back and see what the last question was.

Q. I asked him what he had said to him.

THE COURT: What he had said to Stidham, what this witness said to him?

MR. RILEY: What he said to Stidham.

THE COURT: I don't think so. Lets go back and find the question.

MR. HENNELLY: I don't know, I think that is a pretty prejudicial thing. I think if the Court will read these two cases, especially this Montgomery Case, it hits it right on the nose.

THE COURT: I have already ruled on it and my ruling is the same, except that I think he ought to ask this witness the question so that counsel for Defendant may have an opportunity to object if he wishes to object, but I am ruling that this witness is not to testify or not to be asked what statements he [511] made, or what statements he had from other parties, and that he told the Defendant about. He can tell what the Defendant said.

Q. Lieutenant Eitzman, how long did you talk to the Defendant about the killing of Donnell? A. Prior to him writing a statement, writing, reducing a statement to handwriting, I would say about thirty minutes.

Q. And then did the Defendant write this Exhibit 16 and 16-1? A. He did.

Q. And will you tell the Court and Jury just how he went about writing it, what was done and what was said? A. I asked him if he would desire to reduce his statement that he had made to handwriting, and he said he would, so he was seated at a table in the field house and given a pen by Sergeant Little and he wrote the statement out after we asked him one or two questions, as a preliminary basis for the statement, which was his age and where he was situated at the time of the riot and what he was doing his time for. And then we told him to go ahead and tell in his own words or write in his own words, own handwriting, his own thoughts about just what happened.

Q. Now that Exhibit 16 and 16-1, does that contain your words or Stidham's words? A. These are Stidham's words.

[512] Q. Did you dictate it to him? A. No, sir.

Q. Did you tell him what facts to relate in there? A. No, sir, except that we wanted the information he had just told us pertaining to the murder.

Q. All right. Now, how long did it take him to write it? A. Oh, I would say fifteen or twenty minutes.

Q. Did he sign it? A. Yes, sir, he did.

Q. Did you sign it there as a witness? A. I did.

Q. In his presence? A. I did.

Q. Did you see him sign it? A. I certainly did.

Q. You also initialed the first page there, 16? A. I did.

Q. Now, in addition to what is contained in that written statement, did you have any other conversations with him about Donnell? A. Yes, sir, I asked him—

MR. HENNELLY: Same objection which I heretofore made with respect to the oral statements Your Honor. May I say this, may the objection, I think it is the type of objection that may go to all of this testimony, because he was in custody at [513] the time, and I take the position that both the oral statement and the written statement was in violation of his Constitutional Rights, so that objection to any and all statements which the Defendant made after he was taken into custody—

THE COURT: Yes, and the objection is overruled.

MR. HENNELLY: Very well.

THE COURT: You may proceed.

Q. Go ahead Lieutenant. A. May I have the question please.

THE COURT: Did he make any oral statement other than the statements that are contained in the Exhibit 16 and 16-1?

A. Yes, sir, he did. He stated that he was somewhat peeved at Donnell, because Donnell had snitched on some prisoners back in St. Louis, and caused them to receive a

lot of time and that also Donnell had snitched on him, and it was Donnell's fault that he was being detained down in Death Row. He said that he told him that he had told the guard about him, and another inmate attempting to start a riot about two months prior to this riot.

MR. HENNELLY: Object to that particularly, and ask that that be stricken and the Jury instructed to disregard it and a mistrial declared, for the reason it is an attempt to prove another time, and trying to put the, attempt to put the reputation of the Defendant in—at issue.

[514] THE COURT: Overruled.

MR. RILEY: That is all.

Recross-Examination by Mr. Hennelly

Q. Lieutenant, there are rules, are there not, within the Police Department, against beating anybody, isn't that right? A. That is correct.

Q. And as a matter of fact, the beating of any prisoner, even under those circumstances, would make anyone doing that, beating, liable to Federal prosecution? A. That is true.

Q. You are familiar with that, aren't you? A. Yes, sir.

Q. And you realize that if you had beat any prisoner under those circumstances, you could be prosecuted under the Federal Civil Rights Statute? A. Yes, sir.

Q. You know that? A. Yes, sir.

Q. So you tell the Court and Jury that you didn't beat anybody, isn't that right? A. That is right.

Q. And you didn't beat anybody up in Jefferson City?

MR. RILEY: If the Court please, we object to the form of the question, it is argumentative and it should be confined to [515] this defendant.

THE COURT: Yes, the objection will be sustained.

Q. I withdraw the question.

MR. RILEY: He said anybody in Jefferson City.

MR. HENNELLY: I withdraw it. When did you arrive in Jefferson City Lieutenant, with respect to the night of the 22nd of September? A. About eleven o'clock P.M., Central Standard Time.

Q. And was the head of the Police Force of the City of St. Louis up there? A. Yes, sir.

Q. Colonel Long? A. Yes, sir.

Q. An appointment, an appointee of the Governor, isn't that right? A. That is right.

Q. And were you on duty up there from the night of the 22nd on? A. I was.

Q. How long did you remain up there? A. One week to the day, until the 29th.

Q. Now, I will ask you if, during the time that you were up there, that you used any physical violence on any prisoners during the riot?

MR. RILEY: Object to that, not material, and they have got [516] twenty-eight hundred convicts up there.

[516] THE COURT: The objection will be sustained, and Gentlemen of the Jury, may I say this, that when the Court sustains an objection to a question that has been asked, there are no inferences to be drawn from that question or from the sustaining of the objection, or from the ruling of the Court. Now, we are concerned with the case of the Defendant, and the case of this Defendant only. And this witness may be cross-examined about anything concerning this Defendant that he may or may not have done, or that counsel wishes to cross-examine him about, but the asking of matters as to other parties would not be material in the trial of this case, and the fact that they weren't answered or were answered, or that the Court sus-

tains an objection to them, are not to leave any inferences in the minds of the Jury. All right, you may proceed.

MR. HENNELLY: May I make one statement in the record?

THE COURT: You may.

MR. HENNELLY: That that was, the question was asked for the purpose of showing the state of mind of the officers and I was going to augment that question, and expand it to determine whether or not any such misconduct had been done in his presence to show the state of mind of the other officers who are testifying in this case, and to show what interest, if any, they might have in their testimony. That [517] was the reason for saying it Your Honor.

THE COURT: The objection is still sustained.

Q. Very well Your Honor. Now then, I am going to ask you, did you question, while you were in Jefferson City, any of the Thompson boys? A. No, I did not.

Q. Did you question Linder? A. Not that I know of.

Q. Now then, when the Defendant came in, he was with one of your Police Officers, is that right? A. A Police Officer and a Trooper.

Q. And I believe that you are attached to the Central District in St. Louis, are you? A. That is right.

Q. That is the downtown district? A. That is correct.

Q. And this officer who was with him, did you know which one it was? A. Yes, sir, I do.

Q. Who was it? A. Patrolman Jenneman.

Q. Now, what district is he out of? A. Central.

Q. He is out of your district? A. Yes, sir.

Q. And Billings, who was there, was he out of your district [518] also? A. That is correct.

Q. And I will ask you this, can you give His Honor and this Jury any idea, with respect to the time that the Defendant came into that room? A. That he came in?

Q. Yes. A. I would say about eleven o'clock in the morning on the 27th.

Q. And I believe you have indicated that he had first denied any complicity in this murder completely? A. That is right.

Q. As a matter of fact, ever since the time of the riot he had denied any complicity? A. That I don't know. That was the first time I talked to him.

Q. And—

MR. RILEY: Just a moment, let the man answer the question.

THE COURT: Yes, give him an opportunity to answer.

Q. I think he has answered it Your Honor. His statement, or his answer was that that was the first time he talked to him. A. That is correct.

Q. During this original questioning, in which this Defendant denied any part in this thing, was he standing or sitting? A. Sitting.

[519] Q. And was he sitting in the same position that he sat throughout the entire interrogation, and during the time that State's Exhibit 16 and 16-1 was written? A. No, sir, he wasn't.

Q. All right, did he get up at anytime? A. Yes, sir, he did.

Q. When in the course of that interrogation did he get up? A. After he had gave a verbal statement, he was asked to move over to a table where he could sit and write. He walked to that table.

Q. Now then, will you tell us where within that room his original questioning took place then? A. Well, he was more or less sitting about five or six feet away from a table in the center of the floor.

Q. And did you officers, were you officers around him? A. Not all around him. My back was against the table sitting in a chair, and the other officers were, Trooper

Caldwell was to my right and Sergeant Little was on my left. He was seated at the table. Trooper Caldwell was standing up, and Jenneman and Overbeck were somewhere right in back of me, or on the side of me.

Q. And what was the closest officer in that room to the Defendant at that time? A. I was.

Q. And at that time, were there any manacles on his feet? [520] A. Manacles?

Q. Any handcuffs on his feet? A. No.

Q. There wasn't any, did you see any rope in there? A. No, sir.

Q. Was he ever lifted from the ground and suspended from the ceiling? A. No.

Q. That wasn't done? A. No.

Q. Did he ever pass out while he was in there? A. No.

Q. Did he make any complaint to you with respect to the paralysis of his left hand? A. He did not.

Q. Did you examine his hand or did you examine him yourself to see whether or not there had been any physical injury to him? A. No, I didn't.

Q. Did you at anytime see him with his hands behind him suspended from the ceiling? A. No.

Q. Now, did anybody besides you ask any questions? A. I did most of the questioning and the verbal questioning until he made his verbal statement, and it is possible that one or two of the officers may have asked a question.

[521] Q. Now then, did anybody, after he began writing that statement, did anybody at all stop him at anytime and tell him to take a different path of attack, or to change anything or do anything like that? A. No, they didn't.

Q. Was there anybody looking at him as he was writing? A. Yes, sir.

Q. Who was doing that? A. Sergeant Little was looking at him and I was standing there, standing watching him.

Q. Were you standing close to him? A. I would say within three feet.

Q. You weren't sitting down at the end of that table then, you were standing at one of his sides, is that right? A. I was standing and sitting, I may have sat down a few minutes and got up again.

Q. Are you finished? A. Yes, sir.

Q. Did any of you fellows have any shotguns with you in there? A. We had riot guns.

Q. Riot guns? A. Yes, sir.

Q. And I will ask you this, where with respect to the point that the Defendant was sitting, was Sergeant Little sitting? A. He was at the Defendant's right side.

[522] Q. At the Defendant's right side? A. Yes, sir.

Q. And where were you Lieutenant? A. I was on his left side.

Q. Was Little standing or sitting? A. Sitting.

Q. Now, I will ask you Lieutenant, how long did it take the Defendant to write that statement? A. Like I said before, about twenty minutes.

Q. Twenty minutes? A. Yes, sir.

Q. Didn't anybody in there even make an abusive statement of any kind to him? A. No, sir.

Q. Did not? A. No.

Q. Didn't threaten him at all? A. None whatsoever.

Q. No further questions Your Honor.

Redirect Examination by Mr. Riley

Q. Lieutenant, do you recall what kind of a ceiling is in that building? A. No, I certainly don't, not exactly. I know it is rather low.

Q. Well, is it exposed rafters? [523] A. No, sir, it is a solid ceiling, it is covered.

Q. That is all.

MR. HENNELLY: No further questions.

ELMER OVERBECK,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Will you state your name please? A. Elmer Overbeck.

Q. And how old are you sir? A. Thirty-seven.

Q. Where are you employed? A. St. Louis Metropolitan Police Department, St. Louis, Missouri.

Q. How long have you been employed by the Police Department? A. Going on six years.

Q. I will ask you if you are, if you know the Defendant Stidham? A. I do.

Q. I will ask you to examine Exhibit, State's Exhibit 16 and 16-1. A. Yes, sir.

Q. Is that Exhibit, does that Exhibit contain your signature? A. That is it on the bottom of the second page.

Q. And what about the first page? A. That is the first of the second page, it is all the same [524] statement.

Q. Did you, who signed the statement? A. I did myself, along with the other officers.

Q. Who made the statement? A. The Defendant Stidham.

Q. Now, where were you when this statement was made? A. We were in the field house over by the ball diamond adjoining the Penitentiary proper.

Q. I will ask you if, were you there when Stidham came in? A. I was there then.

Q. Now, tell the Court and Jury as near as you remember, what, if anything, happened from the time he got in there? A. Well, he was brought down to the field house adjoining the baseball diamond, and I was in there with the other officers, two officers brought him down, and he sat down at a table and we talked to him for a while.

Q. Now, who did the talking? A. Lieutenant Eitzman did most of the talking.

Q. All right. Go ahead. A. And we talked to him I imagine twenty or twenty-five minutes, something on that order, regarding the riot and the killing of Donnell, and after about twenty-five minutes of talking to him, he stated he wished to make a statement, and then he went on and gave us an oral statement in regard to what all happened, and after doing that, he finished by [525] stating that he wanted to make a written statement, which he did.

Q. Now, that Exhibit that you have there, did you all dictate that to him? A. No sir.

Q. Did he write it himself? A. Yes, sir, he wrote it himself.

Q. Did anyone else tell him what to put in it? A. Not at any time.

Q. Did anyone tell him what words to use? A. No, sir.

Q. Now, officer, you have read that statement over? A. I have.

Q. You say that he made an oral statement prior to that? A. He did.

Q. Now I will ask you if he made a statement in your presence orally, as to any motive he might have had for the killing of Donnell?

MR. HENNELLY: Object to the form of that question being leading and suggestive and calling for a conclusion Your Honor.

THE COURT: Overruled, it is asking for a statement.

Q. I asked him if he did make a statement. Did he make such a statement? A. He did.

[526] Q. Now, as near as you can recall, what did he say?

MR. HENNELLY: Now, I renew the objection Your Honor.

THE COURT: Overruled.

MR. HENNELLY: Very well.

A. Well, at that time we asked him what his reason was for participating in the riot, and the killing, and he stated to us in regard to the killing of Donnell, that he didn't like him, he was a snitch. That he had snitched on him previously with other fellows that he had snitched on with regard to the riot that they had in July at the Penitentiary and caused him to be placed in O hole.

MR. HENNELLY: Object to that and ask that it be stricken and the Jury instructed to disregard it and a mistrial declared, for the reason it is an attempt to prove another crime, and put the character and reputation of the Defendant at issue.

THE COURT: Overruled.

Q. Officer, while you were there, did you or did anyone in your presence promise him anything to make either the oral or written statement? A. Not at anytime.

Q. Did you or anyone there threaten him in any manner? A. No, sir.

Q. Did you or did anyone there in your presence hit the Defendant? [527] A. No, sir.

Q. Either with your hand or fist or club or any instrument? A. No, sir.

Q. And did you or did anyone there hang him up from the ceiling? A. No, sir.

Q. Do you recall what kind of a ceiling is in that building? A. It was a flush flat ceiling, the way I recall it, just a straight board across.

Q. Are there any exposed rafters or anything in there? A. No, I never noticed anything like that.

Q. Is that the building that you and the other St. Louis officers were using at that time in the Penitentiary? A. That is the one, the field house.

Q. Was there any particular reason why this Defendant was taken there?

MR. HENNELLY: Object to the form of that question as calling for a conclusion, and would be a self-serving statement.

THE COURT: This witness knows why this Defendant was taken there, if he knows, he may answer, as to whether it would be a particular reason or not, I don't know.

Q. I withdraw the question Your Honor.

THE COURT: All right.

MR. RILEY: That is all.

[528] *Recross-Examination by Mr. Hennelly*

Q. Officer Overbeck, you are attached to the Central District in St. Louis, aren't you? A. That is right.

Q. Now Officer, I am going to ask you whether or not in the course of the interrogation of this Defendant. you mentioned, you personally ever mentioned the words Linder and Thompson? A. Myself?

Q. Yes, you? A. Never.

Q. Now, Officer, you are acquainted with Linder and Thompson, aren't you? A. I am acquainted with Linder.

Q. And with Thompson? A. No, sir.

Q. Isn't it a fact that while you were in St. Louis, weren't you active in that investigation of that particular

case, under which Thompson and Linder and Donnell were convicted? A. I arrested Linder with three other members of a hold-up gang, which Thompson was not involved in at that particular arrest.

Q. I see. Do you know of your own knowledge whether or not Donnell, who was the person who was dead in this case, had not assisted the Police Department and had not testified against Linder and Thompson in St. Louis? [529] A. I couldn't say. I don't know.

Q. You don't know? A. I don't know. I was not there.

Q. Well, do you know of your own knowledge, now, where were you, you were not there, you don't know of your own knowledge? A. I could only testify to hearsay and that won't—

MR. RILEY: He has answered.

THE COURT: The witness could only testify to what he knew about it actually from his own knowledge.

Q. That is what I was asking him.

THE COURT: Well, he has said that he doesn't know from his own knowledge.

A. I wasn't there.

Q. Now then, I will ask you, did you, were you one of the officers that went over and got the Defendant? A. No, I wasn't.

Q. Did you at anytime have any conversation with this Defendant about his wrist watch? A. Never.

Q. Never did? A. No.

Q. When he came in, do you recall whether or not he had a wrist watch on? A. No, I don't.

Q. Did you, while you were up in the Penitentiary on this case, did you personally interrogate Linder and Thompson up [530] there? A. Never.

MR. RILEY: If the Court please, I don't know what Thompson and Linder has to do with this case, the mate-

riality, I object to it for the reason it is not material whether he ever talked to Linder or Thompson. I can't see where it proves or disproves anything in this case.

MR. HENNELLY: I think in view of the fact that Linder and Thompson are mentioned in that statement, I think that then there will be some testimony in respect to Thompson and Linder in the statement that this officer made, I wanted to show whether he talked to Thompson and Linder, and they are referred to in 16 and 16-1.

THE COURT: Let me see your exhibit again please. I think the Defendant should be permitted to cross-examine about whether this witness ever spoke to Linder or Thompson.

MR. RILEY: You mean, is that in the Penitentiary?

MR. HENNELLY: Yes, sir.

MR. RILEY: My objection was prior to that.

THE COURT: He previously testified that he arrested Linder and don't know anything, didn't have any personal knowledge about Thompson.

MR. RILEY: I have no objection to any question about in the Penitentiary.

Q. I think that I asked you Officer Overbeck, did you during [531] your tour of duty after September 22nd in Jefferson City, at the Penitentiary, interrogate or participate in interrogating either Linder or Thompson? A. No.

Q. You didn't? A. No.

Q. Now then, I am going to ask you Officer, do you know how long the Defendant was in that room altogether? A. In the field house?

Q. Yes. A. Must have been around an hour and a half.

Q. How long was he in there before he first left? A. Before he first left?

Q. Before he, I am sorry. I withdraw that. How long was he in there before he was questioned, or was he

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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1971

No. 71-22

HAROLD R. SWENSON, Warden,
Missouri State Penitentiary,
Petitioner,

vs.

JAMES WILLIAM STIDHAM,
Respondent.

RESPONSE NOT PRINTED

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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..... TERM, 1971

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Petitioner,

vs.

JAMES WILLIAM STIDHAM,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Comes now the petitioner, Harold R. Swenson, Missouri State Penitentiary for Men at Jefferson City, Missouri, and through his Attorney of Record, seeks a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and would state and allege in the following particulars, to-wit:

OPINIONS BELOW

The Opinions of the Supreme Court of Missouri are cited as *State* v. *Stidham,* (Mo.Sup. 1957) 305 S.W.2d 7; *State* v. *Stidham,* (Mo.Sup. 1967) 415 S.W.2d 297; and *State* v. *Stidham,* (Mo.Sup. 1970) 449 S.W.2d 634, and are appended hereto as Appendixes A through C. That the Opinion of the United States District Court for the Western District of Missouri, not yet reported, is cited as *Stidham* v. *Swenson,* ..... F.Supp. ....., No. 18121-2, and is appended hereto as Appendix D. That the Opinion of the United States Court of Appeals for the Eighth Circuit, not yet reported, is cited as *Stidham* v. *Swenson,* ..... F.Supp. ....., No. 20685, and is appended hereto as Appendix E. A Motion for Rehearing or Transfer to the Eighth Circuit Court En Banc, which was denied by an equally divided Court on June 11, 1971, is appended hereto as Appendix F.

JURISDICTIONAL STATEMENT

That the petitioner filed a Petition for Writ of Habeas Corpus pursuant to Title 28, Section 2254, U.S.C.A., in the United States District Court for the Western District of Missouri, Western Division. That from the denial of the granting of the writ by that court, the respondent appealed to the United States Court of Appeals for the Eighth Circuit, which by its opinion filed on May 24, 1971, remanded the cause to the District Court for further proceedings consistent with the remedy provided for in *Sigler* v. *Parker,* 396 U.S. 482 (1970).

Jurisdiction is conferred upon this Court by the provisions of Section 1254, Title 28, U.S.C.A., in that this petition is sought within ninety (90) days from the filing of the opinion below and is, therefore, timely under the provisions of Section 2101, Title 28, U.S.C.A.

QUESTIONS PRESENTED

Did the Eighth Circuit Court of Appeals, sitting in *habeas*, correctly apply *Sims* v. *Georgia*, 385 U.S. 538, by holding that a finding that a confession was ". . . [N]ot involuntary as a matter of law . . ." did not comply with *Jackson* v. *Denno*, 378 U.S. 368?

Did the Eighth Circuit Court, sitting in *habeas*, correctly interpret Missouri procedure when it held that the Missouri procedure of 1955 as to the introduction of confessions in evidence before a jury did not comply with *Jackson* v. *Denno*, 378 U.S. 368?

Did the Eighth Circuit Court of Appeals, sitting in *habeas*, abuse its discretion by allowing a second appeal, on identical issues, from the denial of a petition for habeas corpus, after the petitioner had once voluntarily dismissed his appeal?

STATUTORY PROVISIONS INVOLVED

Title 28, U.S.C.A., Section 1291, provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . ."

Title 28, U.S.C.A., Section 2253, provides:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> "There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant

to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

Title 28, U.S.C.A., Section 2254, provides:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of

competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

STATEMENT

Respondent is presently confined at the Missouri State Penitentiary at Jefferson City, Missouri, serving a life sentence for First Degree Murder. The procedural history of this case is as follows: On November 23, 1954, an indictment was returned by the Grand Jury and filed in the Circuit Court of Cole County charging defendant and six other penitentiary inmates with the First Degree murder of Walter Lee Donnell, another inmate at that institution, on or about September 22, 1954, during a riot at the Missouri State Penitentiary (Tr. 5, Cause No. 45537). On that same date, all of those accused including defendant were arraigned before the Court and counsel was appointed to represent each of them individually. On December 6, 1954, all of the accused entered pleas of not guilty (Tr. 7, 10-11, Cause No. 45537).

On December 14, 1954, defendant filed a Motion for Production and Inspection, a Motion to Dismiss, a Motion for a Severance, a Motion for a Polygraph Examination and a Motion to Suppress (Tr. 12-18, Cause No. 45537). On December 20, 1954, the Court sustained the Motion for a Severance (Tr. 18, Cause No. 45537), and denied the Motion to Dismiss (Tr. 19, Cause No. 45537) and the Motion to Suppress (Tr. 20, Cause No. 45537). On December 23, 1954, the Court denied the Motion for a Polygraph Examination and on January 3, 1955, the State confessed the Motion for Production and Inspection (Tr. 22, 24, Cause No. 45537). On February 15, 1955, defendant filed an application for change of venue and an affidavit in support thereof based upon the alleged bias and prejudice of Cole County citizens against him, and also filed an affidavit for disqualification of Judge Sam C. Blair based on alleged interest and prejudice (Tr. 27-44, Cause No. 45537). On February 16, 1955, Judge Blair sustained the application

for his disqualification and so notified the Supreme Court of Missouri (Tr. 45, Cause No. 45537). On February 22, 1955, on order of the Supreme Court of Missouri Judge George P. Adams was transferred to hear appellant's case and on February 25, 1955, Judge Adams sustained defendant's application for change of venue and transferred this cause to the Circuit Court of Butler County, Missouri (Tr. 45-49, Cause No. 45537).

On April 25, 1955, defendant waived formal arraignment, pleaded not guilty and the cause proceeded to trial before a jury. Upon learning that the jury had read a newspaper account of the trial, the Court granted defendant's request for a mistrial and the cause was reset for July 18, 1955 (Tr. 55-64, Cause No. 45537). On July 18, 1955, the trial commenced and continued until July 20, 1955, when the jury returned a verdict finding defendant guilty of murder in the first degree and assessing his punishment at life imprisonment (Tr. 757-760, Cause No. 45537).

The cause was appealed on the Transcript and the conviction was affirmed by the Supreme Court of Missouri on September 9, 1957, *State* v. *Stidham*, (Mo.Sup.) 305 S.W. 2d 7. On March 9, 1958, pursuant to Missouri Supreme Court Rule 27.26, V.A.M.R., the respondent filed *pro se* in the Circuit Court of Butler County a Motion to Vacate and set aside his sentence. The Motion to Vacate was denied without an evidentiary hearing and on appeal the Supreme Court of Missouri affirmed the order and judgment. *State* v. *Stidham*, (Mo.Sup.) 403 S.W.2d 616.

Thereafter, respondent filed a *pro se* Motion to Vacate and Set Aside his sentence pursuant to Supreme Court Rule 27.26, V.A.M.R., which presented claims allegedly not presented in the first motion. The trial court without an evidentiary hearing also denied the second motion to vacate and on appeal, the Supreme Court of Missouri re-

versed the order and judgment and remanded the cause for further proceedings in compliance with the amended provisions of Rule 27.26. *State* v. *Stidham,* (Mo.Sup.) 415 S.W.2d 297. Appellant filed a change of venue, and filed his motion in the Circuit Court for the City of St. Louis, and an evidentiary hearing was had December 5, 1968.

At the evidentiary hearing the original transcript and a stipulation of facts were offered and received in evidence and appellant and the State introduced other evidence pertaining to the issues made by the pleadings. On April 14, 1969, appellant's motion to set aside judgment and sentence was overruled (Tr. 130, Cause No. 54674). A consolidated appeal, both reinstated direct appeal and appeal from respondent's 27.26 hearing, was made to the Supreme Court of Missouri and that Court affirmed the decision of the lower court. *State* v. *Stidham,* (Mo.Sup.) 449 S.W.2d 634.

On February 18, 1970, respondent filed petition for *habeas corpus* in the United States District Court for the Western District of Missouri, Western Division which was denied by that Court by order entered on May 15, 1970. [*Stidham* v. *Swenson,* ..... F.Supp. ....., No. 18121-2]. From this denial respondent filed a Notice of Appeal and a request for Certificate of Probable Cause which was granted. On June 25, 1970, the United States Court of Appeals for the Eighth Circuit granted respondent's Motion to Dismiss his appeal and on October 14, 1970, denied respondent's Motion to Reinstate his appeal on the Eighth Circuit docket. On September 25, 1970, appellant filed a second petition for *habeas corpus* in the United States District Court for the Western District of Missouri which by reference he stated identical grounds as his prior petition. The United States District Court for the Western District of Missouri likewise denied this petition for writ of *habeas*

corpus, and an appeal was taken to the United States Court of Appeal for the Eighth Circuit. That Court, on the 24th day of May, 1971, reversed and remanded to the District Court for further proceedings provided for in *Sigler* v. *Parker,* 396 U.S. 482 (1970), requiring a further evidentiary hearing before the Missouri courts.

The historical factual evidence presented before the Missouri Circuit Court in 1955 was as follows: Sgt. E. V. Nash of the Missouri Highway Patrol was the State's first witness and set the physical scene by identifying Exhibit 1 as a drawing he made showing the physical makeup of B-Basement of the Missouri State Penitentiary on September 22 and 23, 1954 and in describing that building and the contents thereof (Tr. 57-64), this witness also identified Exhibits 2, 3, and 7 as photographs showing gates, passageways and cells in and around the maximum punishment area of that institution.

Lt. W. S. Barton of the Missouri State Highway Patrol testified that at 10:00 p.m. on September 22, 1954, he arrived at the Missouri State Penitentiary and went to B-Basement, where he found the severely mutilated body of a man in Cell-18 of the maximum punishment area (Tr. 91-92). Lt. Barton identified Exhibit 8 as a photograph of a man whose body he found and it was introduced into evidence (Tr. 93-94). Lt. Barton further identified Exhibit 9, a sixteen pound sledge hammer, as the instrument he found beside the body on the night in question and further identified Exhibit 10 as a photograph of Cell-18 of the maximum punishment area (Tr. 95-98). This witness testified that when he found the sledge hammer it was bloody, and that all three (3) doors leading into the maximum punishment area of the Missouri State Penitentiary were standing open with water on the floor and debris scattered about (Tr. 108).

Sgt. James Rhodes, a Laboratory Chemist for the Missouri State Highway Patrol, testified that he analyzed stains on Exhibit 9, the sledge hammer, and that they were human blood (Tr. 128-130).

J. G. Lamar, Superintendent of Records at the Missouri State Penitentiary, testified that he had control and supervision of all records at that institution and that by law those records had to contain a photograph of and fingerprints of all inmates. He identified Exhibit 8 as a photograph of Walter Lee Donnell, an inmate at the Missouri State Penitentiary, and stated that on September 22, 1954, he viewed Donnell's dead body (Tr. 135-136), and further testified that he viewed that dead body while Dr. Shull performed an autopsy on it (Tr. 142-144).

James Enyard, an employee of Dulle Funeral Home in Jefferson City, Missouri, testified that on September 24, 1954, he saw the dead body of the person shown in Exhibit 8, the photograph of Donnell, and that he removed the body to the funeral home and embalmed it (Tr. 152-155). On the back of that body Mr. Enyard noted on the left side and in the rib section four (4) or five (5) wounds and also found five (5) round wounds on the left chest over the heart (Tr. 155-156). In his opinion the back wounds were made with a knife and front wounds with a round instrument (Tr. 157).

Dr. G. D. Shull testified that in Nashville, Tennessee, on September 25, 1954, he performed an autopsy on the body of Walter Lee Donnell, and this witness described numerous fractures, punctures, and wounds, and said that it was his medical opinion that the skull fracture was a mortal wound (Tr. 163-168). This witness testified that two (2) of the five (5) chest stab wounds went clear through the heart, while two (2) of the back wounds had

penetrated the heart. The chest wounds were mortal while the latter in all probability would be so considered (Tr. 169-170). Dr. Shull further testified that it was his opinion that the back wounds were caused by a thin blade, like that of a pocket knife, but did not penetrate as deep as the front wounds, which were caused by an instrument at least four (4) to five (5) inches long (Tr. 171-172). This witness testified that there were no gunshot wounds in the body (Tr. 172). The doctor testified that he thought the blunt end of Exhibit 9, the sledge hammer, could have caused the injury to the skull of Donnell (Tr. 174).

Clarence Dietzel, a member of the guard force at the Missouri State Penitentiary was on duty at the Missouri State Penitentiary on the night of the riot, and testified that he was on duty in B-Basement and that on that night there were nine (9) inmates in the maximum punishment area, including defendant Stidham (Tr. 187-188). A disturbance started in the prison around 6:30 p.m. that night and a group of rioters thereafter tried to break into B-Basement (Tr. 189). In that group this witness recognized Donald DeLapp, Paul Kenton, Jackie Lee Noble, William Hoover, and Joseph M. Vidauri, and he further heard DeLapp yell to Stidham and tell Stidham that they were coming to get him out and also heard Stidham yell back for them to hurry (Tr. 190-192). Mr. Dietzel testified that the group outside of B-Basement were using a sledge hammer similar to Exhibit 9 (Tr. 203), and an iron bar beating on the doors attempting to gain entrance to B-Basement. DeLapp demanded witness Dietzel's keys, which demand was refused (Tr. 198-199), but eventually the group of inmates broke in Gate No. 2 where the witness was and then they searched him and again demanded the keys to Gate No. 3, which demand was also refused (Tr. 204-205). The group thereafter got through Gate No. 3 and into Death Row, and Noble and others in the group

locked witness Dietzel in a cell in the maximum punishment area for approximately twenty (20) or twenty-five (25) minutes and then took him out of that area and thereafter he did not witness any of the events of the killing (Tr. 207-210).

The State then called James Creighton, an inmate, and defendant objected to his testimony, the basis being that the witness was claimed to be of unsound mind and defendant requested a hearing to determine his competency which was granted (Tr. 241). At this inquiry, held outside of the hearing of the jury, Mrs. Alma Miller, a medical records clerk at State Hospital No. 1, in Fulton, Missouri, testified that she was the custodian of the records of the patients in that hospital (Tr. 242). In conference it developed that only three (3) pages of the record, marked for identification as Exhibits C, C-1, and D were involved (Tr. 246-249), and the witness stated that she did not know who prepared those pages, did not see them prepared, did not know when they were prepared, except that an inmate of the Fulton Hospital typed them, and could not say that they were correct (Tr. 250-252, 256-258). For the purposes of the *voir dire* hearing only the Court admitted Exhibits C, C-1, D, 14 and 15 into evidence and they were incorporated into the Transcript (Tr. 260-267).

Still outside the hearing of the jury, James Creighton took the witness stand and testified in detail concerning his status as an inmate of the Missouri State Penitentiary, his convictions and the legal proceedings thereon, and his being in a cell in the maximum punishment area on the night in question (Tr. 267-270). He admitted being in Fulton State Hospital No. 1, Fulton, Missouri for thirty-five (35) days, admitted a cutting while in the Penitentiary, admitted that he had feigned an attempted suicide to get out of solitary at the prison and transferred to Fulton,

but denied being in any other mental institution, denied being taken before a Probate Court or being committed as an insane person (Tr. 270-273). At the close of this hearing, defendant's request to have witness Creighton declared incompetent was refused.

Before the jury witness Creighton testified that he was serving a life sentence in the Missouri State Penitentiary and on the night of September 22, 1954, was in Cell 17 in the maximum punishment area, next to Walter Lee Donnell in Cell 18 (Tr. 278-279). In June, 1954, defendant began celling in the maximum punishment area and from then until the night of the riot defendant cursed, ridiculed and threatened Donnell over and over and told Donnell that he would kill him if he could get at him (Tr. 280-285). On the night of the riot DeLapp and defendant Stidham hollered back and forth to each other, DeLapp saying that he was going to get defendant out of his cell and defendant begging DeLapp to hurry, during which time defendant was continuing to threaten to kill the witness and Donnell (Tr. 288-290). Defendant Stidham told Donnell that Donnell was to be killed because he had testified against "Thompson and them in St. Louis before the grand jury" (Tr. 291). Later defendant Stidham got out of his cell and together with Hoover, DeLapp, Kenton, Noble, Laster and Vidauri tried to get into the witness's cell, after clearing the other inmates out of the maximum punishment area (Tr. 292-293). This group had a key for the lock to witness's cell and were using a pole to keep witness back from the front door of the cell and a sledge hammer like Exhibit 9 did not pound the screens such as is shown on Exhibit 10, the photograph of the cell. During all of this the witness received a broken jaw but by jamming the lock to the cell with concrete, a comb and "junk" he kept them from getting in (Tr. 294-296). He heard defendant

Stidham tell Donnell they would get him next (Tr. 297) and then the group moved to Donnell's cell where the sledge was again used (Tr. 295).

From his cell witness could not see a person enter Donnell's cell but he could see a man go right up to the cell, all seven (7) of the men, including defendant Stidham, headed for Donnell's cell and went out of witness's sight, whereupon witness heard Donnell begging, hollering and pleading for his life, witness then heard a gurgling sound and saw the seven (7) men run out of the cell but thereafter he did not see any of them during that night (Tr. 297-299).

Herman Trout, an inmate of the Missouri State Penitentiary and a plumber of that institution, testified that on the night in question he went into his shop in B-Basement after the riot started (Tr. 335-337) and hid his tools from the riotors and watched while DeLapp, Hoover and Kenton tried to force open a door and heard DeLapp talk with defendant Stidham about getting Stidham out of his cell (Tr. 338-340). At DeLapp's direction a fire was started and later Vidauri and Noble joined them and knives were produced (Tr. 341-342). Witness Trout testified that the group eventually got the three (3) doors leading into the maximum punishment area open and defendant Stidham and Laster were let out of their cells, whereupon witness saw DeLapp put his arm around defendant and say "Gentlemen, I have brought you this far, this is your leader from here on." (Tr. 344-346). Defendant Stidham and others then got weapons, took Guard Dietzel out of that area and after getting the other inmates cleared out, went down into the cage of cells in the maximum punishment area proper (Tr. 347-351). Witness Trout heard hollering and yelling, and after the hollering stopped defendant Stidham and others emerged from death row and washed

their hands in a wash basin and discarded some of their clothing (Tr. 352). From his position witness could see the actions of the seven (7) men until they got into the maximum punishment area proper, and during the time the seven (7) were in there he heard a man screaming and yelling in a shrill voice stating that he was not a snitch (Tr. 353-354). While the seven (7) were getting into the maximum punishment area and while they were there, including the time that they washed and left the area, witness was in the dark in a position where the group could not see him (Tr. 384, 388). Witness testified that he did not see who murdered Walter Lee Donnell (Tr. 389).

Sgt. Percy Little, a State Highway Patrolman, testified that on September 27, 1954, he and another Patrolman and four (4) City of St. Louis policemen questioned defendant in the Athletic Building of the State Penitentiary, and defendant at that time wrote out a statement, identified as Exhibits 16 and 16-1, and then signed it (Tr. 394-396). At this stage the Court granted defendant's request for a preliminary hearing inquiring into the voluntariness of the oral and written statements made by defendant (Tr. 398). At this hearing, which covers pages 400-485 of the Transcript, the State presented the testimony of all the police officers and patrolmen who were present at the time of the questioning of defendant and who heard this oral confession and saw him sign Exhibit 16 and Exhibit 16-1. Each testified that no physical force or threats were used against defendant and that defendant voluntarily and of his own free will signed the confession admitting that he and others went into Donnell's cell and cut and beat Donnell and that he himself had used a kitchen knife six (6) to seven (7) inches in length to slash Donnell's face and neck. Each of the officers identified his signature on Exhibit 16-1 and his initials on Exhibit

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16, the latter being the first page of the written statement and the former the second page thereof. None of the officers saw a rope in the questioning room and none saw anyone abuse defendant in any way. Defendant Stidham himself testified on this preliminary hearing and said that on being questioned in the Athletic shed on September 27, 1954 he had first denied any knowledge of the death of Donnell (Tr. 474). At this time defendant Stidham said that he was held on a stool by handcuffs and a belt attached to the legs thereof and that a coat was placed on him and his hands were cuffed behind him (Tr. 452). When he told his interrogators that he would be willing to submit to a lie detector test, Lt. Eitzman told him that he would be given that test immediately, and he was thereupon raised off the floor by a rope attached to the handcuffs on his wrists. The first chaining up lasted fifteen (15) minutes, according to defendant Stidham's testimony, and he still refused to sign a statement, so he was raised up again and left hanging for thirty-five (35) more minutes, during which time he lost consciousness twice and was beaten. Defendant Stidham testified that he suffered an injury to his left arm rendering the hand thereof paralyzed in places (Tr. 453-455), and defendant further testified that because of the torture and pain he agreed to write out Exhibits 16 and 16-1, which he said were dictated to him by Sgt. Little (Tr. 455). At the close of this testimony the Court made the following ruling:

> "THE COURT: 16 and 16-1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the jury, subject of course to any attacks as to its credibility by the defendant. The defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the jury, but it is the Court's opinion that upon the evidence that has been offered before the Court that outside of the hear-

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ing of the jury, that the statement is and should be admissible in evidence, subject to further examination of witnesses which might be conducted, so we may proceed with Sgt. Little, as to his identification before the jury of the statement in question, Exhibits 16 and 16-1.

"MR. HENNELLY: In other words, the Court is overruling my motion, and request of the Court to hold as a matter of law, that these statements were involuntary, is that right?

"THE COURT: That is right. Mr. Sheriff will you bring the jury back in? [Tr. 486]."

Six police officers then testified before the jury and each identified Exhibits 16 and 16-1 as defendant's written statement and testified that it was voluntarily given (Tr. 486-565). Over defendant's objection the exhibits were then introduced into evidence and read to the jury (Tr. 569-571). After reading the confession of defendant Stidham, the State rested its case and the Court denied defendant's motion for judgment of acquittal of Murder in the First Degree and his motion for a reduction of the charge (Tr. 572-573). Defendant Stidham's first witness was Clyde Bridger, State Registrar of Vital Statistics, who identified Exhibit FF as a photostat of the Official Certificate of Death of Walter Lee Donnell, as amended, and also identified Exhibit G as a photostat of that certificate before its amendment (Tr. 574-580). The witness testified that Exhibit G showed the cause of death as being a bullet wound by gun and that Exhibit FF showed the cause of death as by injuries multiple, exchanged stab wounds in heart and lung, brain trauma and crushing injury of skull (Tr. 581-582), the witness testified that the amendment was made because of an affidavit furnished by the Cole County Sheriff, he being the one who signed the original Certificate of Death (Tr. 582-583). Defendant Stidham then testi-

fied that on the night in question he was in a cell in the maximum punishment area of the Missouri State Penitentiary next to the shower, somewhere West of Creighton's cell, and that at about 6:30 p.m. he heard the riot commence (Tr. 592-593). Stidham denied threatening Donnell or Creighton at any time but recalled that Creighton had often threatened to kill him and others in the maximum punishment area (Tr. 593-594). An unknown inmate let him out of his cell and he then went upstairs to B-Hall where he listened to the radio and drank coffee with other inmates (Tr. 596-597). He denied killing Donnell and denied ever being in the cell of Donnell on the night in question, stating that: "I am a thief, but I am not a murderer" (Tr. 597). Stidham testified he was questioned repeatedly about the murder by police officers and denied any implication at all times (Tr. 597-600). He then repeated his version of the giving of his oral and written statement in the Athletic shed at the Missouri State Penitentiary and stated that those statements were given because of the pain he was suffering and his inability to resist the torture applied (Tr. 600-604). He further denied being with DeLapp, Laster and Hoover at any time on the night in question (Tr. 621) and further testified that the rope which was used to string him up in the shed was tied through a web partition and then to the ceiling of the shed (Tr. 624, 626).

The jury found defendant Stidham guilty of murder in the first degree and his punishment was assessed at confinement in the Missouri State Penitentiary during the rest of his natural life.

ARGUMENT

The Eighth Circuit Court Below, Sitting in Habeas, Incorrectly Applied Sims v. Georgia, 385 U.S. 538, by Holding That the Finding by the Circuit Court of Butler County, Missouri, That a Confession Was Not Involuntary As a Matter of Law Did Not Comply with Jackson v. Denno, 378 U.S. 368.

This case involves the correct application by the Circuit Court of Appeals for the Eighth Circuit of this Court's Opinion in *Sims* v. *Georgia,* 385 U.S. 538, and necessarily includes a determination to be made as to the correct procedures in finding a confession voluntary pursuant to *Jackson* v. *Denno,* 378 U.S. 368. By reference to the opinion of the Eighth Circuit, attached hereto as Appendix E, it can be seen that that Court remanded for a hearing consistent with *Sigler* v. *Parker,* 396 U.S. 482, to the United States District Court for the Western District of Missouri, which had denied respondent's petition for writ of *habeas corpus* without an evidentiary hearing. The stated basis on which this case was remanded by the Eighth Circuit is set out at pages 3-4, and 6 of its opinion as follows:

> "We believe that the district court's analysis is incorrect. It assumes that Missouri law, at the time of Stidham's trial, required the trial court to find that a confession was voluntary before permitting it to be considered by a jury. Our examination of the Missouri case law convinces us that a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary." . . . In its most recent *Stidham* opinion, 449 S.W.2d 634 (1970), the Missouri Supreme Court examined its procedure and determined that ". . . Missouri employed the so called Massachusetts procedure 'impliedly approved in Jackson v. Denno. . . .' In doing so, the court relied upon State v. Washington, 399 S.W.2d 109 (1966). We

point out that *State* v. *Washington* was decided after *Jackson* became the law, and a comparison of its standard with those enunicated in the Missouri cases, above cited reveals the difference between the 1955 and 1966 standards."

With this basis then the Court cavalierly concluded that the Circuit Court of Butler County, Missouri, submitted the voluntariness issue to the jury without making a prior *factual* determination that the confession was voluntary.

In this regard, the court stated at page 5 of its Opinion:

"Our analysis of the record of Stidham's trial leads us to conclude that the trial judge in this case submitted the voluntariness issue to the jury without making a prior factual determination that the confession was voluntary. His finding, that the confession was not 'involuntary as a matter of law,' was not, under the then existing Missouri law, the same as finding that it was voluntary."

Petitioner would note that this court was unable to draw this same conclusion in its Appendix to *Jackson* v. *Denno*. See Footnote 9 to Court's Opinion at 378 U.S. 380; and Appendix to the Opinion of the Court at 378 U.S. 397. These references indicate that it was unclear from appellate court opinions as to whether the Massachusetts or New York procedure was used by the trial court in determining the voluntariness of confessions.

In essence, then, the Eighth Circuit has found that the Missouri procedure prior to *Jackson* v. *Denno*, was the same as that procedure used by New York struck down in *Jackson*. This was done irrespective of the fact that the Missouri Supreme Court had, in *State* v. *Washington*, (Mo. Sup. 1966) 399 S.W.2d 109, held that the pre-*Jackson* cases in Missouri were indistinguishable in legal effect from the

Massachusetts rule approved. In that case, the court stated:

> ". . . The Missouri practice does not run afoul of the rules laid down in those cases for the determination of a voluntariness of a confession. In Jackson v. Denno, 378 U.S. 368, Footnote 7 at page 377, 84 S.Ct. 1774, at page 1781, 12 L.Ed.2d 908, states that: 'Under the New York rule the judge is not required to exclude the jury while he hears evidence as to voluntariness and perhaps is not allowed to do so.' The New York practice was condemned in Jackson v. Denno. It seems the practice of the State of Washington was quite similar to the New York rule. The Missouri practice is indistinguishable in legal effect from the Massachusetts rule as described and impliedly approved in Jackson v. Denno. See also Commonwealth v. Marshall, 338 Mass. 460, 461-462, 155 N.E.2d 798, 800. The Missouri practice contemplates a preliminary or voir dire examination to determine the competency of a confession before it is presented to the jury. This is a full hearing on the voluntariness of a confession out of the presence of the jury and a finding by the court that the confession was voluntary before it is admitted in evidence. State v. Howard, Mo., 383 S.W.2d 701, 702[1]. Thereafter, the witnesses to the circumstances under which the confession was made testify before the jury. The jury then determines the probative value of the confession under the instructions of the court which direct the jury to disregard it entirely if the jury finds the confession was not voluntarily made. State v. Deyo, Mo., 387 S.W.2d 561, 564, 565 [5, 6]; State v. Howard, Mo., 383 S.W.2d 701, 702 [1]." *Id.* at 114.

Petitioner would submit that as Circuit Judge Gibson said in dissent, at page 9, the Supreme Court of Missouri is the best interpreter of its own cases.

To reach its conclusion that a Missouri trial court *"could and frequently did"* submit the question of volun-

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tariness to a jury without prior determination of voluntariness by the court, the Eighth Circuit quoted from *State* v. *Gibilterra,* 116 S.W.2d 88, 94, at page 4 of its Opinion. Taken in context, the quote should read as follows:

> "It is not the law that if there be any substantial evidence indicating the confession was voluntary the court *must* refer the question to the jury, however much it may be outweighed by evidence to the contrary. If that were true the court would be doing no more than it always does throughout a trial in ruling on the admissibility of evidence; and there would be no need of such preliminary hearings except in the rare instances when such evidence is wholly lacking. On the other hand, when there is substantial conflicting evidence and the question is close it is better to refer the underlying issue of voluntariness to the jury than to exclude the confession, since there is less chance of a miscarriage of justice by leaving the question open to a second determination, before the jury on a rehearing of the evidence under proper instructions, than by foreclosing the inquiry. . . ." [Emphasis in original.] *Id.* at 93-94.

Similarly, the Eighth Circuit's reliance on *State* v. *Sanford,* 193 S.W.2d 37 (1946) is misplaced. *Sanford* was a concurring opinion by Judge Hyde of the Missouri Supreme Court, in a trilogy of cases cited as *State* v. *Ellis,* 193 S.W.2d 31, *State* v. *Sanford,* 193 S.W.2d 35, and *State* v. *Ellis,* 193 S.W.2d 37. The majority opinion for the Supreme Court of Missouri, sitting en banc, in this trilogy of cases was written by Judge Douglass and was a case concerning the applicability of *Lyons* v. *State of Oklahoma,* 322 U.S. 596; and *Ashcraft* v. *Tennessee,* 322 U.S. 143, it being defendant's position in that case that his confessions were involuntary as a matter of law and, thus, should not have been admitted into evidence by the trial court in that he was not taken before a committing magistrate having juris-

diction over the crime. Factually, then, the Eighth Circuit's reliance on *State* v. *Sanford* is inappropriate.

Likewise the reference in *State* v. *Laster*, 293 S.W.2d 300, relied upon by the Eighth Circuit factually differs from the case under instant consideration. In that case, when the State had indicated that the confession of Defendant Laster would be offered, a co-defendant with Respondent Stidham, the court conducted a hearing outside of the presence of the jury, at which Defendant Laster offered no testimony. The Supreme Court of Missouri then stated:

> "Since the defendant chose not to introduce any evidence at the preliminary hearing, and the state made a prima facie case on the voluntary nature of the confession, the court necessarily ruled it admissible. State v. Gibilterra, 342 Mo. 577, 116 S.W.2d 88, 93. In some instances our courts have considered also the evidence adduced before the jury in making a final ruling on the admissibility of a confession. State v. Gibilterra, supra; State v. Ramsey, 355 Mo. 720, 197 S.W.2d 949, 954. Here there was no motion to strike the confession at the conclusion of all the evidence. We rule the confession admissible, however, on the broader ground that on all the evidence there was no showing sufficiently strong to convince the court conclusively, or as a matter of law, that the confession was involuntary. . . ." *Id.* at 303-304.

Petitioner does not contend that the Missouri procedure prior to *Jackson* v. *Denno, supra*, strictly followed either the Wigmore rule, nor the Massachusetts rule. Petitioner does contend, however, that Missouri practice has consistently contemplated a preliminary or voir dire examination to determine the competency of a confession before it may be presented to a jury. That Missouri practice has consistently contemplated that the hearing is to be outside the presence of the jury, and that all evidence

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dealing with the voluntariness of the confession is to be presented for the court. Additionally, Missouri practice has consistently contemplated that the State carries the burden of proving voluntariness and that before a jury may consider a confession, the judge must find that the confession is not involuntary as a matter of law. Thus, petitioner would submit that the Eighth Circuit Court of Appeals has incorrectly interpreted *Jackson* v. *Denno.*

Irrespective, however, of what Missouri law may or may not have been as to the voluntariness of confessions in 1955, petitioner would submit that on the historical record presented herein, that the Circuit Court of Butler County, Missouri, did make a determination concerning the voluntariness of Respondent Stidham's confession and that that determination complied with *Jackson* v. *Denno.* Counsel for Respondent Stidham requested that a hearing be held outside the presence of the jury. Such a hearing was had, covering pages 400 through 485 of the transcript, Cause No. 45537. By motion, defense counsel requested:

> ". . . The court to conduct a preliminary examination and ask the court to inquire into the voluntariness of the statement, and to determine whether the statement was given voluntarily . . . and we ask that the hearing be conducted outside the hearing of the jury."

At the end of this voir dire hearing, and after hearing the testimony of two Missouri State Highway Patrolmen, and four City of St. Louis Policemen, the court ruled as follows:

> "The Court: Now, at the conclusion of the hearing held outside of the hearing of the jury, the request of the defendant for a hearing upon the statement which has been identified as
>
> "Mr. Riley: 16 and 16-1.

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"The Court: 16 and 16-1, it is the court's opinion that the matters concerning the statement should be offered in the presence of the jury, subject, of course, to any attacks as to its credibility by the defendant. The defendant has, of course, the right to proceed to challenge the voluntariness of the statement and confession, even before the jury, but it is the court's opinion that upon the evidence that has been offered before the court and outside of the hearing of the jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted, so we may proceed with Sergeant Little, as to his identification before the jury of the statement in question, Exhibit 16 and 16-1.

"Mr. Henley: In other words, the court is overruling my motion, and request that the court to hold as a matter of law, that these statements were involuntary, is that right?

"The Court: That is right. Mr. Sheriff, will you bring the jury back in?"

Petitioner will submit that the trial court has quite clearly, and "with unmistakable clarity" determined the voluntariness of the confession pursuant to the standards in *Jackson* v. *Denno*. Apparently, the requirement of *Jackson* v. *Denno*, is that certain talismanic words must appear on the record before the procedure complies with the requirements of due process. In this regard, Judge Gibson of the Circuit Court below in dissent stated:

"The argument here appears to be more a matter of semantics or technicalities than a substantial procedural defect in trial proceedings. The trial court's decision in admitting the confession was based on conflicting evidence, the same evidence that is now urged to upset the verdict and judgment of the state court. No new evidence has been adduced and we are in effect now being asked to review this same evidence and hold the procedure bad because the judge did not

use the magic rubric 'voluntary' but said in effect, as is clearly shown by the record, that the confession was admissible and not involuntary as a matter of law. By refusing to hold that the confession and statements were involuntary, the court in the context of this hearing would be holding that the confession and statements were voluntary. This particular preliminary hearing on the confession and statements was not held just to see if there was conflicting evidence, as under the New York Rule held defective in *Jackson* v. *Denno*."

In light of the foregoing, petitioner would submit that the Eighth Circuit has incorrectly applied *Sims* v. *Georgia*, 385 U.S. 538, in that the record clearly indicates the Circuit Court of Butler County, Missouri, found defendant Stidham's confession voluntary.

Petitioner would also note the unusual circumstances by which respondent Stidham's appeal reached the Eighth Circuit after a successive filing of his petition for writ of habeas corpus in the United States District Court for the Western District of Missouri. By reference to Appendix G, Appendix H, and Appendix I, it can be seen that on June 25, 1970, the Eighth Circuit granted respondent Stidham's Motion to Dismiss his appeal. It can further be seen that on September 25th, petitioner filed a successive habeas corpus petition in the United States District Court for the Western District of Missouri, and simultaneous therewith filed a motion to reinstate his appeal in the Court of Appeals. The Court of Appeals denied his motion but the United States District Court for the Western District of Missouri entertained respondent's second petition and in reliance on its prior order denied issuance of the writ. It is this second denial of exact issues which respondent appealed to the Eighth Circuit. While petitioner recognizes that res judicata is not a general rule applied in habeas

corpus proceedings, petitioner would submit that what is exhibited on this record is an abuse of the habeas proceedings.

Petitioner concludes that an abuse of the habeas procedure is seen by the litigious nature of the respondent, and would particularly note the dismissal of this cause originally before the Eighth Circuit, and the subsequent second filing on the exact issue before the District Court. Respondent would conclude that pursuant to Title 28, Section 2244(b); *Salinger* v. *Loisel*, 265 U.S. 224; and *Smith* v. *Yeager*, 393 U.S. 122, that the Circuit Court below abused its discretion in allowing the docketing of petitioner's second appeal in this case. Quite candidly, petitioner would admit that this issue was not briefed to the Circuit Court below, but would contend that this issue goes to the jurisdiction of the Circuit Court below to hear this cause and therefore this court may enter judgment.

WHEREFORE, petitioner prays that a writ of *certiorari* be issued to the United States Court of Appeals for the Eighth Circuit, and that this case be reviewed by this court and that the judgment below should be reversed.

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APPENDIX A

STATE of Missouri, Respondent

v.

James William STIDHAM, Appellant.

No. 45537

Supreme Court of Missouri,
Division No. 2.
Sept. 9, 1957.

Prosecution resulting in conviction of first degree murder arising out of a prison riot and based on a theory of conspiracy. The Circuit Court of Butler County, Randolph Weber, J., entered judgment of conviction and defendant appealed. The Supreme Court, Bohling, C., held that instruction concerning conspiracy using the words, "aid, abet, assist or encourage" in the disjunctive rather than conjunctively, was proper and did not erroneously authorize a conviction upon a finding that defendant did any one of the four acts.

Judgment affirmed.

1. Criminal Law (Key) 736(2)

In prosecution resulting in a conviction of first degree murder, question concerning the voluntariness of defendant's confession was for jury.

2. Homicide (Key) 308(3), 309(5)

In prosecution resulting in conviction of first degree murder, under defense of alibi the only submissible issue of guilt under evidence was murder in first degree, and therefore the trial court did not err in failing to instruct on murder in the second degree and manslaughter. Section 559.010 RSMo 1949, V.A.M.S.

3. Criminal Law (Key) 437

In prosecution resulting in conviction of first degree murder arising out of prison riot, diagram of floor plan of prison basement, which showed location of cells, steel gates and which was drawn to scale and which was identified by the person making it as well as others was admissible. Section 559.010 RSMo 1949, V.A.M.S.

4. Criminal Law (Key) 404(4)

In prosecution resulting in conviction of first degree murder arising out of a prison riot, 16-pound sledge hammer found at side of victim's body the night of riot was admissible. Section 559.010 RSMo 1949, V.A.M.S.

5. Criminal Law (Key) 1169(5)

In prosecution resulting in conviction of first degree murder arising out of a prison riot, court's instruction to witness not to testify to any statements made by others and conveyed to defendant by the witness cured any alleged error of police officer attempting to explain to defendant that officer had a statement from others.

6. Criminal Law (Key) 432

In prosecution resulting in conviction of first degree murder, trial court properly refused exhibits allegedly relating to fact that a witness was of unsound mind and incompetent since the sources of information and the method and time of preparation of exhibits were not such as to justify exhibits' admission. Sections 490.680, 559.010 RSMo 1949, V.A.M.S.

7. Witnesses (Key) 79(3)

It is court's function, not the function of jury, to pass on competency of a witness. Section 491.060 RSMo 1949, V.A.M.S.

8. Witnesses (Key) 330(3)

Trial courts may exercise a sound discretion as to the extent of the examination of witnesses with respect to specific acts on collateral matters affecting their credibility and not directly connected with the issues on trial.

9. Criminal Law (Key) 1136

Where defendant's counsel did not avail himself of court's offer to recall witness, defendant could not assert error in that he had been unable to cross-examine a witness completely in respect desired.

10. Homicide (Key) 308(1)

In prosecution resulting in conviction of first degree murder, instruction properly required jury to find that the conspirators willfully killed victim.

11. Criminal Law (Key) 755½, 761(11), 811(3)

Where defense to murder prosecution was alibi and there was no contention or evidence that the victim had not been murdered, use of the words "kill and murder" and "killing and murdering" and their repetition several times in an instruction did not constitute comment on evidence or single out and give undue prominence to such words and did not assume a murder had been committed.

12. Homicide (Key) 305

In prosecution resulting in conviction of defendant of murder in the first degree based on theory defendant had conspired with others to kill victim during prison riot, under statute that principals in second degree in the commission of any felony or accessories to any murder or other felony before the fact may be charged, tried, convicted and punished in same manner, as the principal in the first de-

gree, use of words "aid, abet, assist or encourage" in instruction concerning conspiracy disjunctively rather than conjunctively did not erroneously authorize conviction upon the finding that defendant did any one of the four acts. Sections 556.120, 556.170, 559.010 RSMo 1949, V.A.M.S.

13. Criminal Law (Key) 64

With respect to convictions of principals in second degree, in absence of statutory provisions, no particular acts are necessary, nor is it necessary that any physical part in the commission of the crime be taken; mere encouragement is enough.

14. Conspiracy (Key) 41

Persons entering a conspiracy after its formation are deemed in law parties to all acts done by any one of the conspirators, before or after persons' entrance, in furtherance of the conspiracy.

15. Homicide (Key) 234(1)

Evidence justified finding that a conspiracy had been committed and finding of the actual participation in and consummation of the conspiracy to murder by defendant and others named in indictment. Section 559.010 RSMo 1949, V.A.M.S.

16. Criminal Law (Key) 822(1)

An instruction is to be considered as a whole and with other instructions in the case.

17. Conspiracy (Key) 41

Criminal Law (Key) 64, 69

Act of one of conspirators in the furtherance of a conspiracy is the act of the other conspirators and principals

in the second degree and accessories before the fact are equally guilty with the principal in first degree. Section 556.170 RSMo 1949, V.A.M.S.

18. Criminal Law (Key) 763(19), 781(5)

In prosecution resulting in conviction of first degree murder, instruction regarding voluntariness of defendant's confession was proper and statement in instruction to the effect that if jury did not believe that a statement, written or oral and claimed to be a confession made by the defendant, was voluntarily made by him, jury should disregard the statement, was not ambiguous, misleading, incomplete or a comment on evidence. Section 559.010 RSMo 1949, V.A.M.S.

19. Criminal Law (Key) 805(3)

In prosecution resulting in conviction of first degree murder, instruction to effect that if jury believed defendant's statement, written or oral, was voluntarily made, jury must consider such statement did not mislead jury although more appropriately the word "may" could have been used rather than the word "must".

20. Criminal Law (Key) 388

Results of a lie detector examination are inadmissible in evidence.

21. Criminal Law (Key) 900

The statutory right of an accused to no reference to his failure to testify may be waived by him. Section 546.270 RSMo 1949, V.A.M.S.; 42 V.A.M.S. Supreme Court Rules, rules 26.08, 28.02, 28.08.

22. Criminal Law (Key) 721(2)

When an accused takes the stand in his defense, his failure to testify on specific facts involved in the case is a legitimate subject of comment by the state in argument.

23. Criminal Law (Key) 721(2)

Where defendant, accused of murder in first degree, had taken the stand, defendant's failure to deny incriminating facts was open to comment whether the denial should have occurred in an appearance in chief or in an appearance in surrebuttal. Section 546.270 RSMo 1949, V.A.M.S.; 42 V.A.M.S. Supreme Court Rules, rules 26.08, 28.02, 28.08.

Mark H. Hennelly, St. Louis, for appellant.

John M. Dalton, Atty. Gen., Winston Cook, Sp. Asst. Atty. Gen., for respondent.

BOHLING, Commissioner.

James William Stidham appeals from a sentence of life imprisonment for the first degree murder of Walter Lee Donnell during the riot at the Missouri Penitentiary on the evening of September 22, 1954, in Cole County, Missouri. § 559.010. (Statutory references are to RSMo 1949 and V.A.M.S.) The indictment charged defendant, William R. Hoover, Jackie Lee Noble, Paul Edward Kenton, Rollie Laster, Don Wm. DeLapp and Joseph M. Vidauri with the commission of the offense. All were inmates of the penitentiary. Defendant's case, upon his application for change of venue, was tried in the Circuit Court of Butler County, Missouri, in July, 1955. Defendant was well represented by counsel. He has filed no brief. His motion for new trial presents many issues.

The defense was an alibi; but certain issues call for some detail of the facts.

[1] I. There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted in evidence before the State established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, found the issue was for the jury, and later, after hearing the evidence before the jury, submitted the issue to the jury for determination. The testimony was to like effect at each hearing. Two members of the State Highway Patrol and four members of the St. Louis Metropolitan Police force, present at the time defendant claimed physical violence occurred, testified that no promises had been given, or physical violence, duress, threats or abuse was offered to defendant, categorically denying defendant's testimony. On the conflicting showing the issue of the voluntariness of the confession was for the jury. State v. Gibilterra, 342 Mo. 577, 116 S.W. 2d 88, 93 [3, 4]; State v. Laster, Mo., 293 S.W.2d 300, 303 [1, 2]; State v. Sanford, 354 Mo. 998, 1006 [4], 193 S.W.2d 31, 37, 38 [2]; State v. Menz, 341 Mo. 74, 106 S.W.2d 440, 448 [12].

Defendant stated, among other things, in his confession, written in his own hand, that several prisoners broke into death row and Paul Kenton unlocked his cell door. He and several other prisoners then went to Creighton's cell to attack him but he had his lock blocked and they could not enter. They then entered Donnell's cell, and, quoting: "Kenton held Donnell while Laster stabbed him several times with an ice pick, at the same time I slashed at him three or four times around the face and neck with a knife that Kenton gave me when he opened the door. When Donnell fell to the floor Linder and Thompson each said get Donnell with the sledge and they proceeded to

hit him with a sledge hammer and a crowbar." Defendant also orally stated that he did not like Donnell because Donnell had snitched in regard to a riot in July and caused defendant to be punished; that Donnell had snitched on some of the boys and they had received a lot of time; and that he was living his life under a different code than the officers.

The jury could find, aside from defendant's confession, the following outlined facts from the evidence.

The homicide occurred in what is known as "death row." Death row, consisting of thirty-two cells, was located in the basement of "B" Hall. Three heavy steel gates or doors separated death row proper from other parts of the building. B Hall proper, above death row, housed a cell block.

The riot started about 6:30 p. m. September 22, 1954. Nine inmates, for various reasons were confined in death row that evening. Defendant, who was known as "Slick," and his co-indictee Laster occupied adjoining cells, having been transferred to death row about July, 1954. Donnell, the deceased, and James M. Creighton also occupied adjoining cells in death row, some distance from defendant and Laster.

From the date defendant was placed in death row he would "holler down" and curse and ridicule Donnell, threatened to kill Donnell if he ever got to him, said that "when they come in here and get us out, we are going down there and kill" Donnell and Creighton; and that they should have killed Donnell over in E Hall when they broke out over there.

Clarence Dietzel was on guard duty in death row the night of the riot. He noticed the disturbance and started closing the windows to death row. Defendant and Laster

demanded that the windows opposite their cells be left open.

About 7:00 or 7:30 p. m. some of the rioters tried to break into B Basement. While the prisoners were trying to break into death row, defendant and Laster "hollered" that they would be down to kill Donnell and Creighton as soon as they got out of their cells. Defendant said he was going to kill Donnell because Donnell took the stand against one Thompson and some others.

DeLapp, known as Curley, Kenton, Noble, Hoover, and Vidauri, were among the number trying to break in. They worked on the first door with a sledge hammer, crowbars, pick and other small tools. DeLapp called to defendant, saying: "Slick, this is Curley DeLapp. We will be in to get you out if it takes, costs us hell and high water." "We are coming down to get you out. We are going to get you out." Defendant answered: "Hurry up, Goddamn it, I am waiting for you." DeLapp sent Hoover and Kenton out to burn the buildings. They returned. Vidauri guarded a paint bucket containing knives, having 5 or 6 inch blades, used in the twine plant. After working on the door for a while, DeLapp called to defendant that they could not make it and were going to try something else. Defendant told DeLapp to come around to the south windows and said he might make it there. DeLapp, Noble, Hoover and Kenton went out and tried to make an entrance through the wall into death row with the sledge hammer. Defendant and Laster talked to DeLapp through the open windows and had him go back and work on the door. They again started to work on the door and DeLapp called to defendant saying: "We are going to try again." Then, in a short time someone produced a key and the men came into B Basement proper. DeLapp and also Kenton demanded Dietzel's keys, threatening to kill him if he refused to hand

them over. Dietzel insisted he did not have the keys and did not give the keys to them. DeLapp with the help of others, then broke the lock on the second door with a sledge hammer. DeLapp, Noble, Kenton and Hoover immediately entered to where guard Dietzel was. They placed Dietzel on a small table and searched him for the keys, Kenton pulling the lining completely out of his coat. DeLapp ordered Dietzel to call the warden's office and immediately took the telephone from him. About this time the door to death row proper opened. Noble and Kenton placed Dietzel in one of the death row cells, where he remained for about twenty minutes, and was then taken up the steps and placed in the mop room in B Hall.

DeLapp, Noble, Kenton, Hoover, Vidauri and one Miller finally released defendant and Laster, as well as other prisoners who desired to be released from their cells in death row. DeLapp led them up the aisle and said to the onlookers: "Get back men, they are coming out now"; and when they came out and stopped, DeLapp put his arm around defendant's shoulders and said: "Gentlemen, I have brought you this far, this is your leader from here on." Defendant answered: "Well men, I am ready to work." They then went into the room where Vidauri was guarding the knives and returned to death row armed with weapons. Defendant told Vidauri to go ahead but Vidauri answered, "No, I am going with you. I am all the way with you guys." They then went back into death row. DeLapp had the other inmates go upstairs in B Hall.

Defendant, Laster, Hoover, DeLapp, Kenton, Noble and Vidauri tried to break into Creighton's cell. They had a sledge hammer, a pole and other weapons. Creighton had jammed his lock with concrete and a comb. Defendant said he was going to settle the score with Donnell and

Creighton. They broke Creighton's jaw in two places, using a pole. He got the pole away from them, and started using it on them. Defendant told Donnell they would be over to get him next. They could not get Creighton's cell door open and started working on Donnell's door. Creighton heard Donnell's door go back and saw the seven men walk up to go into Donnell's cell. He could not see through the cell walls. He heard Donnell hollering: "I ain't no rat, I ain't no snitch. And I ain't never harmed you boys," and he was begging them. Pretty soon Donnell was going Oh, oh, and he hollered real loud and got to kind of gurgling. The men then ran out of Donnell's cell and up the aisle. They went to a wash basin and each washed his hands. Defendant and Noble took off their undershirts and discarded them.

Donnell received a multiplicity of wounds. He had five stab wounds in the front and four stab wounds in the back on the left side in the region of the heart and lungs. Two of the front wounds passed completely through his heart and two of the back wounds penetrated his heart. His skull had sustained an egg shell type fracture, three or four inches in area, a multiple crushing type fracture of many small fragments, which could have been made by a bloody, 16-pound sledge hammer found alongside his body about 10:30 p. m. that day by an officer. He had other wounds on his body.

[2] II. Defendant contends error resulted from the court's failure to instruct on murder in the second degree and manslaughter. The defense was an alibi. The only submissible issue of guilt under the evidence was murder in the first degree. State v. Taylor, 347 Mo. 607, 148 S.W. 2d 802, 805 [5]; State v. Clymer, Mo., 159 S.W.2d 808, 812 [9]; State v. Barbata, 336 Mo. 362, 80 S.W.2d 865, 868 [1, 2]. See State v. Laster, Mo., 293 S.W.2d 300, 302, and §

559.010. It also follows that error was not committed in overruling defendant's motions for judgment of acquittal and judgment of acquittal as to murder in the first degree.

[3,4] III. Defendant's contentions that State's Exhibits No. 1 and No. 9 should not have been received in evidence because hearsay, not properly identified and because such action violated his constitutional rights are without merit. The testimony established that Exhibit 1 was a diagram of the floor plan of B Basement, showed the location of the cells, steel gates, et cetera, was drawn to scale, and it was identified by the person making it and others. State's Exhibit 1 was admissible. State v. McGee, 336 Mo. 1082, 83 S.W.2d 98, 107 [26]; State v. McHarness, Mo., 255 S.W.2d 826, 829 [6]. Exhibit 9 was a bloody 16-pound sledge hammer found at the side of Donnell's body by W. S. Barton of the State Highway Patrol about 10:30 p. m. the night of the riot. It was also identified by a number of other witnesses. Defendant's confession refers to the use of a sledge hammer in the killing of Donnell. There was no error in the admission of Exhibit 9. State v. Hopkins, 278 Mo. 388, 213 S.W. 126, 128 [5]; State v. Wilson, 223 Mo. 173, 189, 122 S.W. 671, 676 [5].

[5] IV. During the examination of Officer Eitzman of St. Louis, who was present at the time defendant gave his written confession, the officer stated he talked to defendant "and explained to him that I had a statement * * *." Defendant's objection to the remark was sustained and the witness was instructed not to testify to any statements made by other prisoners and conveyed to defendant by the witness. Notwithstanding the court's ruling, defendant's motion for new trial asserts the court could not cure the alleged error. A more questionable situation arose under similar circumstances in State v. Vidauri, Mo., 293 S.W.2d 955, 956 [2,3], and was ruled against defend-

ant's contention. See State v. Montgomery, Mo., 223 S.W. 2d 463, 466 [11,12]. The point is ruled against defendant.

[6,7] V. Defendant claims error in the exclusion of his Exhibits B, C, C-1, and D. Exhibit B was never offered in evidence.

Defendant objected to James M. Creighton being sworn as a witness on the ground he was of unsound mind and incompetent. The jury was excused and a voir dire hearing was conducted at which Mrs. Alma Miller, the Medical Records Clerk of State Hospital No. 1, at Fulton, and Creighton were examined. Mrs. Miller produced a file of a number of pages marked defendant's Exhibit B for identification, and out of the file defendant offered and the court accepted in evidence at the voir dire examination two typewritten sheets marked defendant's Exhibits C and C-1; and another typewritten sheet marked defendant's Exhibit D.

Creighton testified on voir dire that he had been in "solitary" for about eighteen months and "played crazy," put on a good act to get out of solitary and be sent to the State Hospital and after thirty-five days was returned to the Penitentiary; that he had never been before a Probate Court and committed as an insane person; and that he had been in a mental institution only that one time. The court found that Creighton was a competent witness.

Later, upon Creighton's cross-examination before the jury defendant developed that Creighton had put on a pretty good act and had been transferred to the State Hospital at Fulton, where he remained five or six weeks before being retransferred to the Penitentiary, and placed in death row in May, 1954. Upon an objection being interposed to a question, counsel for defendant, out of the presence of the jury, stated he was asking the court to

make Creighton's competency as a witness a jury question. The court informed counsel the jury passed on the credibility of witnesses but not their competency and counsel was entitled to examine the witness on any matters affecting his credibility. Counsel stated he would not pursue the matter further. His subsequent offer of said Exhibits C, C-1, and D in evidence before the jury was refused.

Mrs. Miller testified that Exhibits C and C-1 were attached to a Missouri Penitentiary letterhead; that she did not know who made the record or when it was made, and could not say it was a record of State Hospital No. 1; and with respect to Exhibit D she was not willing to swear it was correct because it was not signed. The showing was such as to permit of a finding that the sources of information, and method and time of preparation of the exhibits were not such as to justify their admission before the jury. § 490.680; Gray v. St. Louis-San Francisco R. Co., 363 Mo. 864, 254 S.W.2d 577, 579 [1]. In addition, it was the court's function, and not the function of the jury, to pass on the competency of the witness. § 491.060; State v. Whitsett, 232 Mo. 511, 526(IV), 134 S.W. 555, 560(4); Kleinschmidt v. Bell, 353 Mo. 516, 183 S.W.2d 87, 91 [4,5]; State v. Herring, 268 Mo. 514, 188 S.W. 169, 172 [3, 5-8]; 97 C.J.S. Witnesses § 119 f, p. 541; 2 Wigmore on Evidence 523, §§ 487, 497(c).

[8,9] VI. The court sustained an objection to defendant's offer of proof at the close of the cross-examination of witness Creighton that he had access to one Mary Annis, they both being confined in the Cole County jail at the time of trial. Thereafter and prior to the calling of the next witness the court made it clear to defendant's counsel that he was at liberty to show the interest of the witness in testifying in the case and to develop any arrangement made covering any special privileges in connection with

his testimony, and offered to recall the witness for further cross-examination. Defendant's motion for new trial states the court erred in not permitting him to cross-examine the witness completely with respect to his association with Mary Annis. Trial courts may exercise a sound discretion as to the extent of the examination of witnesses with respect to specific acts on collateral matters affecting their credibility and not directly connected with the issues on trial. Adriance v. Arnot, 31 Mo. 471; State v. Nasello, 325 Mo. 442, 30 S.W.2d 132, 139 [26]; State v. Brotherton, Mo., 266 S.W.2d 712, 714 [2]. Counsel did not avail himself of the court's offer to recall the witness and may not now successfully urge reversible error.

VII. Defendant makes many attacks on the State's main instruction, Instruction No. 4, which, after defining "felonious," and other terms, reads, in so far as questioned:

"Bearing in mind these definitions and those included in the other instructions, the court instructs the jury that if you believe and find from the evidence, beyond a reasonable doubt, that Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner and by the means hereafter set forth in this instruction, and if you believe and find from the evidence, beyond a reasonable doubt, that pursuant to such a conspiracy and agreement those aforesaid persons, acting in concert and together, on September 22, 1954, in Cole County, Missouri, wilfully, deliberately, premeditatedly, and with malice aforethought did make an assault upon Walter Lee Donnell, and then and there did wilfully, deliberately, premeditatedly, and with malice aforethought forcibly strike, hit,

stab, cut, and beat Walter Lee Donnell in and upon his face, head, and body, with a sledge hammer, and a knife, and another sharp instrument or dagger, if you so find, thereby giving Walter Lee Donnell about his face, head, and body, mortal wounds from the effects of which he died on September 22, 1954, if you so find, and if you further believe and find from the evidence, and beyond a reasonable doubt, that the defendant, James William Stidham, at the time of such killing and murdering, was a member of the conspiracy and agreement aforesaid and theretofore had conspired and agreed with Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri, to aid, abet, assist or encourage them in the killing and murdering of Walter Lee Donnell at the time and place and in the manner and by the means aforesaid, and if you further believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, pursuant to such conspiracy and agreement, was actually present during the killing and murdering aforesaid of Walter Lee Donnell, and that he knew of the felonious purpose and intent of Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph Vidauri to kill and murder Walter Lee Donnell as aforesaid, and that James William Stidham then and there knowingly and intentionally aided, abetted, assisted, or encouraged the aforesaid persons, or any of them, in the aforesaid killing and murdering, then you should find the defendant, James William Stidham, guilty of Murder in the First Degree and by your verdict so say. * * *"

[10] a. The required finding of the instruction that pursuant to a conspiracy the conspirators acting in concert "then and there did wilfully, deliberately, premeditatedly, and with malice aforethought forcibly strike, hit, stab, cut,

and beat Walter Lee Donnell in and upon his face, head, and body, with a sledge hammer, and a knife, and another sharp instrument or dagger, if you so find, thereby giving Walter Lee Donnell about his face, head and body, mortal wounds from the effects of which he died on September 22, 1954, if you so find," refutes defendant's assertion that the instruction did not require the jury to find that the conspirators wilfully, et cetera, killed Donnell.

[11] b. The use of the words "kill and murder" and "killing and murdering" and their repetition several times in the instruction did not, as stated by defendant, constitute a comment on the evidence, or single out and give undue prominence to such words, under the facts adduced in evidence by the State and did not assume a murder had been committed. The instruction required the finding of the submitted facts beyond a reasonable doubt. The defense was an alibi; and there was no contention or evidence that Donnell had not been murdered.

[12, 13] c. Defendant questions the use of the words "aid, abet, assist or encourage" and "aided, abetted, assisted, or encouraged" in the instruction, contending the use of the terms disjunctively rather than conjunctively erroneously authorized a conviction upon a finding that defendant did any one of the four acts. Under § 556.170 principals in the second degree in the commission of any felony or accessories to any murder or other felony before the fact "may be charged, tried, convicted and punished in the same manner, as the principal in the first degree." Consult also § 556.120 on the offense of conspiracy. Blackstone's Commentaries, Vol. 4, Ch. III, p. *34, defines a principal in the first degree as "the actor or absolute perpetrator of the crime; and in the second degree he is who is present, aiding and abetting the fact to be done"; and an accessory before the fact "to be one

who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime." See authorities there cited; also 22 C.J.S. Criminal Law §§ 85-93, p. 152; 14 Am.Jur. 820, B, 832, C. It is stated in 22 C.J.S. Criminal Law § 88, p. 159, with respect to principals in the second degree, in the absence of statutory provisions that "no particular acts are necessary; nor is it necessary that any physical part in the commission of the crime be taken; mere encouragement is enough." And see Id., § 93, p. 164, with respect to an accessory before the fact. McMannus v. Lee, 43 Mo. 206, 208, states: "The law is well laid down that any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as a principal * * *." Approved in State v. Walker, 98 Mo. 95, 104, 110(11), 9 S.W. 646, 650, 652(11), 11 S.W. 1133, and other cases. See also State v. Messino, 325 Mo. 743, 766(V), 30 S.W.2d 750, 760(V); State v. Lawrence, Mo., 280 S.W.2d 842, 848; State v. Ruffin, Mo., 286 S.W.2d 743, 748 [10, 11]; State v. Murray, Mo., 193 S.W. 830, 832; State v. Clymer, Mo., 159 S.W.2d 808, 811 [8]; People v. Chapman, 62 Mich. 280, 284, 28 N.W. 896, 897. The submission was not erroneous.

[14, 15] d. We have hereinbefore stated enough, but not all, of the evidence favorable to the State. Generally, a conspiracy is not shown by direct evidence. It is often inferred from the circumstances. State v. Parr, 296 Mo. 406, 246 S.W. 903, 906 [8]. In the instant case there was ample evidence for a finding of the conspiracy submitted and the actual participation in and consummation of the said conspiracy by the persons named in the instruction. Persons entering a conspiracy after its formation are

deemed in law parties to all acts done by any one of the conspirators, before or after his entrance, in furtherance of the conspiracy. State v. Walker, 98 Mo. 95, 105, 106, 9 S.W. 646, 650; State v. Crab, 121 Mo. 554, 563, 26 S.W. 548, 550; State v. Richetti, 342 Mo. 1015, 119 S.W.2d 330, 342 [14, 15]; 15 C.J.S. Conspiracy § 75, p. 1107; 11 Am.Jur. 571, § 40.

[16] An instruction is to be considered as a whole and with the other instructions in the case. Instruction No. 4 is to be read with No. 5, set out infra. The Missouri cases cited to Point VII, c. sustain Instruction No. 4. It was more favorable to defendant than the law required it to be. We need not detail the other attacks against it.

VIII. Defendant's motion questions Instruction No. 5, which reads:

"The Court instructs the jury that, if you believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, and William R. Hoover, Rollie Laster, Paul Edward Kenton, Jackie Lee Noble, Don William De Lapp and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner and by the means set forth in Instruction No. 4, then the act of either of them pursuant to such conspiracy and agreement to kill and murder Walter Lee Donnell would be in law the act of each one so conspiring and agreeing.

"The word 'Conspiracy,' as used in these instructions, means a common agreement and understanding between two or more persons which is formed for the purpose of committing and doing by their joint efforts some criminal act.

"The Court instructs the jury that all persons are principals who are guilty of acting in concert and together in the commission of a crime. When a crime is actually committed by one or more persons and another person is actually present, and, knowing of the felonious purpose and intent of the person or persons committing the crime, he knowingly and intentionally aids, abets, assists or encourages the person or persons actually committing the crime in the commission of the same, then such person so knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons actually committing the crime in the commission of the same is a principal and he is equally guilty with the person or persons who actually commits the crime.

"However, you are further instructed that the mere presence of a person at the time and place of the commission of a crime by another or others is not alone sufficient to justify him in any manner responsible for the commission of such crime. On the contrary, before such person can be found in any manner responsible for the commission of such crime, the evidence in the case must show, beyond a reasonable doubt, not only that such person was actually present at the commission of such crime, but also that such person knew of the felonious purpose and intent on the part of the person or persons actually committing the crime, and that he then and there was knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons committing the crime in the commission of the same."

[17] This instruction is to be considered with the other instructions in the case. The submitted facts of the first paragraph of Instruction No. 5 were required to be found beyond a reasonable doubt. The other paragraphs of the instruction are merely definitive, legal statements of

what constitutes a conspirator and a conspiracy, assume nothing, and are not subject to successful attack on the ground they are abstract. We have hereinbefore held there was substantial evidence of the submitted conspiracy embracing all the named participants. The conspiracy was incidental to the offense charged. It is also the law that the act of one of the conspirators in the furtherance of the conspiracy is the act of the other conspirators, and § 556.170 makes principals in the second degree and accessories before the fact equally guilty with the principal in the first degree. (See instructions in State v. Cantlin, 118 Mo. 100, 107, 111(II), 23 S.W. 1091, 1093, 1095(2), considered to fairly cover the issue.) What we have hereinbefore said sufficiently answers defendant's attacks against Instruction No. 5. Instructions less favorable to a defendant have been approved. State v. Walker, supra; State v. Messino, supra; State v. Murray, supra; State v. Lawrence, supra; State v. Clymer, supra; State v. Nasello, 325 Mo. 442, 459(IV), 30 S.W.2d 132, 137(IV) (instruction 2 therein being to the same effect as instruction 2 set out in State v. Messino, supra); State v. Williams, 309 Mo. 155, 274 S.W. 427, 434(VII); State v. Dowling, 360 Mo. 746, 230 S.W.2d 691, 694 [6]; State v. Mayberry, Mo., 272 S.W.2d 236, 243 [20].

[18] IX. Defendant also questions Instruction No. 6, which reads:

"The Court instructs the jury that before any alleged statement can be valid, and before you can even consider it, it must have been made voluntarily, that is to say, without anyone having offered to the person who is claimed to have made such a statement any hope of leniency or reward of any kind for making such statement, and without anyone making any threat or doing any violence to the person claimed to have made any such statement in order to induce or force him to confess.

"If the jury does not believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury should entirely disregard such statement in arriving at your verdict.

"If, however, the jury does believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury must consider such statement and you should give it such weight as you believe it deserves in arriving at your verdict."

We do not agree with the contention in defendant's motion that the clause "claimed to be a confession made by the defendant" is ambiguous, misleading, incomplete and a comment on the evidence. The State's evidence was that the statements were voluntary and defendant's evidence was to the contrary. No intelligent jury would be confused. It was proper to instruct on the voluntariness of defendant's statement. State v. Cunningkin, Mo., 261 S.W.2d 85, 87.

[19] Defendant contends in his motion the use of the word "must" in the third paragraph of Instruction No. 6 gives judicial direction to the jury, invades the province of the jury and is a comment on the evidence. The instruction is a cautionary instruction on a collateral issue, does not direct a verdict, and is not on an issue the court is required to instruct upon as part of the law of the case under Sup.Ct. Rule 26.02, 42 V.A.M.S. § 546.070(4); State v. Cunningkin, Mo., supra; State v. Gibilterra, 342 Mo. 577, 116 S.W.2d 88, 94, 95; State v. Francies, Mo., 295 S.W.2d 8, 15 [24, 25]. Trial juries "shall be sworn well and truly to try the case." Sup.Ct.R. 26.02. See §§ 546.070, 546.220; State v. Duff, 253 Mo. 415, 424(IV), 161 S.W. 683, 685(IV). The oath administered to trial jurors embraces the obligation to try the case according to the evidence. Consult 50

C.J.S. Juries § 296, p. 1088; 2 Hale, Pleas of the Crown, 293. The instruction made it plain that before the jury could "even consider" defendant's statement, the jury should find "it must have been made voluntarily," and if the jury did not so find, the jury "should entirely disregard" it in reaching the verdict. An instruction substantially identical to the instant instruction was given in State v. Laster, Mo., 293 S.W.2d 300, 304, a companion case, and we stated, no issue being presented, "an adequate instruction was given on this subject." In State v. Stibbens, 188 Mo. 387, 396(III), 87 S.W. 460, 462(3), an instruction told the jury "you should take such confession into consideration" if voluntarily made. See State v. Pillow, Mo., 169 S.W.2d 414, 416; State v. Hostetter, Mo., 222 S.W. 750, 753(II); State v. Hartman, Mo., 272 S.W.2d 276 [1, 2]. We are not approving the use of the word "must" in the instruction. A more appropriate word would be "may." However, the jury, if it found defendant voluntarily made the statement, would, unless it violated its oath, consider the statement. The questioned clause was modified by the succeeding clause; and under the instruction, if the statement was made voluntarily, the jury was not told how to consider the statement and was free to give the statement no weight whatever in arriving at the verdict. It stated the duty the law placed upon the jury. We conclude on the record before us that the jury was not misled and reversible error did not occur. Consult State v. Harris, 357 Mo. 1119, 212 S.W.2d 426, 428 [7, 8].

[20] X. Defendant complains of the court's overruling of his motion for a polygraph examination of himself, which he offered to pay for. We see no necessity for requesting a court to rule on a motion of this nature. The authorities are to the effect that the results of lie detector examinations are inadmissible in evidence. 23 C.J.S. Criminal Law § 967, p. 295; 20 Am. Jur. 633, § 762; Henderson v. State of Oklahoma, 94 Okl.Cr. 45, 230 P.2d

495, 23 A.L.R.2d 1292, 1306 (annotation). See State v. Cole, 345 Mo. 181, 188 S.W.2d 43, 51 [12]; State v. Hudson, Mo., 289 S.W. 920 [2].

[21-23] XI. Defendant contends in his motion that the court erred in not sustaining his objection to the prosecuting attorney's statement in argument that defendant failed to go back on the stand and rebut certain testimony adduced by the State in rebuttal to testimony given by defendant while on the stand. The statutory right of an accused to no reference to his failure to testify (Sup.Ct.R. 6.08; § 546.270) may be waived by him. State v. Tiedt, 360 Mo. 594, 229 S.W.2d 582, 587 [8]. It is made clear in State v. Larkin, 250 Mo. 218, 234 (III), 157 S.W. 600, 604 [4], 46 L.R.A., N.S., 13, that when an accused takes the stand in his defense, as in the instant case, his failure to testify on specific facts involved in the case is a legitimate subject for comment by the state in argument. State v. Pierson, 343 Mo. 841, 123 S.W.2d 149, 157 [14]: State v. Smith, Mo., 252 S.W. 662, 667 [14]. Having taken the stand, defendant's failure to deny incriminating facts was open to comment whether the denial should have occurred on an appearance in chief or an appearance in surrebuttal.

The transcript discloses that all matters for consideration here upon the record (Sup.Ct.R. 28.02, 28.08) are in proper form and sufficient.

The judgment is affirmed.

BARRETT and STOCKARD, CC., concur.

PER CURIAM.

The foregoing opinion by BOHLING, C., is adopted as the opinion of the court.

EAGER, P. J., and STORCKMAN, J., and BROADDUS, S. J., concur.

LEEDY, J., not sitting.

APPENDIX B

STATE of Missouri, Respondent,

v.

James William STIDHAM, Appellant.

No. 52406.

Supreme Court of Missouri,
En Banc.
June 5, 1967.

Appeal from judgment of the Circuit Court, Butler County, Howard R. Maness, J., denying prisoner's second motion to vacate judgment of conviction. The Supreme Court, Storckman, C. J., held that in view of fact that prisoner would, regardless of judgment on appeal, be immediately entitled to proceed under provisions of not yet effective amended rule requiring motions to vacate to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent, prisoner would be granted maximum relief to which he was entitled so that further proceedings could be held in compliance with provisions of amended rule.

Order and judgment reversed and cause remanded with directions.

1. Criminal Law (Key) 998(1)

Although effective date of newly revised rule requiring motion to vacate judgment to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent is September 1, 1967, trial courts may use the new procedure before that date. V.A.M.R. S.Ct. Rule 27.26.

2. Criminal Law (Key) 998(21)

Amended rule requiring motions to vacate judgment to be in questionnaire form and providing for appointment of counsel if the motion presents questions of law or issues of fact and movant is shown to be indigent is intended to discover and adjudicate all claims for relief in one application and avoid successive motions. V.A.M.R. S.Ct. Rule 27.26.

3. Criminal Law (Key) 1189

In view of fact that regardless of whether denial of prisoner's second motion to vacate judgment of conviction was affirmed or reversed, he would be immediately entitled to proceed under not yet effective amended rule requiring motions to vacate to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent, prisoner was granted maximum relief to which he was entitled so that order and judgment denying motion were reversed and cause was remanded with directions that all further proceedings be in compliance with amended rule. V.A.M.R. S.Ct. Rule 27.26 (c, e, h, i).

Norman H. Anderson, Atty. Gen., Walter W. Nowotny, Jr., Asst. Atty. Gen., Jefferson City, for respondent.

James William Stidham, pro se.

STORCKMAN, Chief Justice.

The appellant James William Stidham is a prisoner in the Missouri State Penitentiary where he is serving a sentence of life imprisonment for murder. The judgment of conviction was affirmed by this court on September 9, 1957. State v. Stidham, Mo., 305 S.W.2d 7. On March 9, 1964, Stidham, pursuant to S.Ct. Rule 27.26, V.A.M.R. filed pro se in the Circuit Court of Butler County a motion to

vacate and set aside his sentence. The motion to vacate was denied without an evidentiary hearing and on appeal this court on June 13, 1966, affirmed the order and judgment. State v. Stidham, Mo., 403 S.W.2d 616. Thereafter, Stidham filed pro se a second motion to vacate under Rule 27.26 which presented claims not made in his first motion. The trial court without an evidentiary hearing also denied the second motion to vacate and the prisoner's appeal from that order and judgment is now before us. The movant filed a brief pro se in this court and made an oral argument.

[1] On January 9, 1967, this court adopted a revised S.Ct. Rule 27.26. The effective date of the revised rule is September 1, 1967, but the trial courts may use the new procedure before that date. State v. Garner, Mo., 412 S.W.2d 155, 157.

[2] The amended rule was adopted after considerable study and is intended to provide a post-conviction procedure in accord with the principles enunciated in the so-called trilogy of Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148, Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837, and Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770. Further in keeping with the teachings of the trilogy, the amended rule is designed to discover and adjudicate all claims for relief in one application and avoid successive motions by requiring motions to be in questionnaire form and by providing for the appointment of counsel if the motion presents questions of law or issues of fact and the movant is shown to be indigent.

[3] These and other provisions intended to furnish more adequate post-conviction relief were not provided by Rule 27.26 in effect at the time the present motion was filed or when the appeal was argued and submitted in this court. It is apparent, however, that regardless of whether

this court affirms the order and judgment, or reverses and remands the cause, the movant will be immediately entitled to proceed under the provisions of amended Rule 27.26 and compliance with the amended rule would be obligatory after September 1 this year. In these circumstances, it would be improvident to process the appeal further and undertake to prepare an opinion on the merits. The maximum relief to which the appellant is entitled in this court is a reversal of the order and judgment of the trial court and a remand for further proceedings under amended Rule 27.26. Bosler v. Swenson, 8 Cir., 363 F.2d 154; Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33. Furthermore, it appears that appellant's motion raises one or more issues of fact on which appellant would be entitled to an evidentiary hearing.

Accordingly, the order and judgment is reversed and the cause is remanded with directions that all further proceedings be in compliance with the provisions of amended Rule 27.26. If appellant elects to proceed with his motion in the trial court, counsel must be appointed under subparagraph (h) of the amended rule since appellant has been shown to be an indigent person. Counsel should file an amended motion which includes every ground known to the prisoner for vacating, setting aside or correcting his conviction and sentence and the prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him, all as required by subparagraph (c) of the amended rule. The trial court then is required to conduct a full evidentiary hearing on the amended motion as required by subparagraph (e) of the amended rule, assuming that the motion raises questions of fact as does the present motion, after which the court then is to decide all issues of fact and questions of law, making findings of fact and conclusions of law as required by subparagraph (i) of amended S.Ct. Rule 27.26.

All of the Judges concur.

APPENDIX C

STATE of Missouri, Respondent,

v.

James W. STIDHAM, Appellant.

Nos. 45537, 54674.

Supreme Court of Missouri,
Division No. 2.
Feb. 9, 1970.

The Supreme Court set aside its affirmance of prior postconviction judgment and remanded cause for amendment of motion to vacate in view of revised postconviction procedure. The Circuit Court of the City of St. Louis, Michael F. Godfrey, J., and the Circuit Court of Butler County, Randy Weber, J., entered judgment from which petitioner appealed. The Supreme Court, Barrett, C., held that even though indictment did not charge conspiracy, instruction hypothesizing that defendants conspired, acted in concert, and aided and abetted in killing did not violate due process on theory that it violated constitutional proscription against jury's consideration of crime not included in indictment where evidence supported hypothesis, indictments charged defendants with killing victim by assault with deadly weapons with malice aforethought and conspiracy was inherent and may have been incidentally included offense.

Affirmed.

1. Constitutional Law (Key) 268(2)

Even though indictment did not charge conspiracy, instruction hypothesizing that defendants conspired, acted in concert, and aided and abetted in killing did not violate due process on theory that it violated constitutional pro-

scription against jury's consideration of crime not included in indictment where evidence supported hypothesis, indictments charged defendants with killing victim by assault with deadly weapons with malice aforethought and conspiracy was inherent and may have been incidentally included offense. V.A.M.S. Const. art. 1, § 18(a); Sections 544.250, 556.120, 556.130, 556.170 RSMo 1959, V.A.M.S.

2. Constitutional Law (Key) 268(2)

Instruction defining conspiracy and stating that all persons who are guilty of acting in concert and together in commission of crime are principals did not infringe on due process by allowing state to prove and jury to be instructed to consider crime not included in indictment where instruction was warranted by statute and there was evidence of conspiracy, actual participation in and consummation, in conspiracy by defendants even though indictment did not charge conspiracy. V.A.M.S. Const. art. 1, § 18(a); Sections 544.250, 556.120, 556.130, 556.170 RSMo 1959, V.A.M.S.

3. Constitutional Law (Key) 268(8)

Record containing corroboration for testimony of two witnesses, alleged to have given perjured testimony, failed to establish violation of due process by state's knowing use of perjured testimony based on fact that such witnesses who had been inmates, had had their sentences commuted and had been released from prison. V.A.M.R. Crim. Rule 27.26.

4. Constitutional Law (Key) 268.1(3)

Where defendant was not prosecuted by information, but by indictment, eliminating need for preliminary hearing, failure of court to appoint counsel at preliminary hearing, even though defendant requested counsel at such hearings, did not deny defendant due process of law. Section 544.250 RSMo 1959, V.A.M.S.

5. Criminal Law (Key) 998(17)

Record, including many pretrial motions by defendant's counsel, failed to support defendant's allegation of lack of counsel prior to trial.

6. Criminal Law (Key) 531(3)

Record failed to support claim that defendant's confession was extracted through physical force and threats of physical force by being beaten with cork ball bat and by not being given any food or water for three days.

7. Constitutional Law (Key) 266

Where, after trial judge overruled motion to suppress confession, all witnesses testified to same facts and circumstances as they had on motion to suppress as it related to issue of voluntariness, and upon this testimony issue of voluntariness was submitted to jury, court's procedure for determining voluntariness did not fail to comport with minimum standards of due process.

8. Criminal Law (Key) 1172(2)

Instructions on voluntary confession were not prejudicially erroneous where there was, at time of trial, only claim that oral and written confessions were obtained by physical force and violence, and no claim of mental coercion and where claim of mental coercion was not raised until 13 years later on motion to vacate sentence. V.A.M.R. Crim. Rule 27.26.

9. Criminal Law (Key) 998(6)

Where, at time defendant gave his statements, circumstances surrounding victim's death and defendant's part in it were known, and defendant's statements played but little if any part in his conviction in view of other testimony,

claim that statement was not voluntary, on ground that three errors, one in age, one in place of residence and prior record, conclusively established that statement was not voluntary, was not ground for postconviction relief. V.A.M.R. Crim. Rule 27.26.

10. Criminal Law (Key) 532

In view of trial court's opinion that statement given by defendant "is and should be admissible in evidence" supported by cogent and convincing evidence, allowing statement to go to jury did not violate Supreme Court decision establishing procedure for admission of confession.

John C. Danforth, Atty. Gen., Kenneth M. Romines, Asst. Atty. Gen., Jefferson City, for respondent.

Mark M. Hennelly, St. Louis, for appellant.

BARRETT, Commissioner.

In 1952 James William (known to one and all as "Slick") Stidham was sentenced to 25 years' imprisonment for his part in the armed robbery of the Grapette Pottling Company in Joplin. For the details of that crime see State v. Stidham, Mo., 258 S.W.2d 620. On October 3, 1955, after a jury trial and verdict in July 1955, Stidham was sentenced to life imprisonment for his participation in the slaying of fellow-inmate Walter Lee Donnell on September 22, 1954, at the height of the riot of approximately 800 inmates of the main prison in Jefferson City. In the trial of the latter case and now, at the behest of Father Clark, he has been represented by a distinguished lawyer, Mr. Mark M. Hennelly, then a successful and experienced criminal lawyer, now a vice-president and general counsel of one of the larger railroads. The murder conviction was appealed upon a full transcript of three volumes, there

was a complete appellate review, the opinion was turned into twenty-three headnotes, after counsel raised what he deemed, no doubt every conceivable point and error. That conviction of murder was affirmed on September 9, 1957, in State v. Stidham, Mo., 305 S.W.2d 7. In view of some of the problems now raised it should be pointed out that before the murder case reached trial stage Stidham's diligent counsel filed every conceivable motion and plea, including the right to a change of venue which accounts for the trial in Butler County, many miles from Jefferson City. Over the years, following the affirmation of the life sentence, Stidham has lodged in this court innumerable letters, communications and pro se motions and they have all been responded to. In June 1966 he personally filed and argued an appeal from a 27.26, V.A.M.R. proceeding in Butler County in which he attempted to present several of the issues now before the court. State v. Stidham, 403 S.W. 2d 616. In the meanwhile the court en banc revised its post-conviction procedure, and Stidham having unsuccessfully instituted another 27.26 proceeding, this court set aside its affirmance of the prior post-conviction judgment and remanded the cause for an amendment of the motion to vacate "which includes every ground known to the prisoner," and in the spirit of the rule for "a full evidentiary hearing" on all questions of fact. The order and judgment in that opinion is reported in State v. Stidham, 415 S.W.2d 297. And on that proceeding, on Stidham's behalf, there has been a change of venue from Butler County and there has been a new and complete hearing before Honorable Michael F. Godfrey, a circuit judge in St. Louis. Furthermore, in response to what was deemed to be the spirit of the Bosler cases, (Bosler v. Swenson, 8 Cir., 363 F.2d 154 and Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33) the court en banc set aside the judgment of this court upon the original appeal, 305 S.W.2d 7, and again appointed Mr. Hennelly

to represent Stidham in both cases. As indicated, there was a full hearing on the 27.26 proceeding, all issues were found against Stidham and he has appealed the judgment in that case. In the order setting aside the original submission the two causes were consolidated and are to be disposed of in this opinion. It should be stated in this connection that Mr. Hennelly has raised, extensively briefed, and orally argued every conceivable claim of error in the original trial, all of which covers and includes every possible right to relief in a post-conviction proceeding.

One of the claims of infringement of due process is that the state was "allowed to prove and the jury was instructed to consider a crime not included in the indictment." Const.Mo. Art. I, Sec. 18(a), V.A.M.S. Thus, it is said, he was indicted for the murder of Donnell, but he "was not, however, indicted for participating in a conspiracy to kill Donnell." Therefore, it is urged that the court erred in admitting in evidence conversations and conduct on the part of others engaged in slaying Donnell. By the same token it is contended that the court prejudicially erred in instructing the jury in referring to and hypothesizing a concert of action, an aiding and abetting in slaying Donnell. In the first place the argument overlooks not only the theory but the specific allegations of the indictment. And in the second place it ignores the facts of Donnell's killing, the circumstances in which he was savagely murdered. While Stidham, as well as his codefendants, was given a severance, the indictment charged that "William R. Hoover, Jackie Lee Noble, Paul Edward Kenton, James William Stidham, Rollie Laster, Don Wm. DeLapp and Joseph M. Vidauri[1]

1. The details of Donnell's murder are set forth in the records and appeals of Stidham's codefendants: State v. Laster, 365 Mo. 1076, 293 S.W.2d 300 (certiorari denied 352 U.S. 936, 77 S.Ct. 237, 1 L.Ed.2d 167); State v. Noble, Mo., 387 S.W.2d 522; State v. Kenton, Mo., 298 S.W.2d 433; State v. Vidauri, Mo., 293 S.W.2d 955 and State v. Vidauri, Mo., 305 S.W.2d 437.

* * * did then and there feloniously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought, make an assault upon one Walter Lee Donnell and then and there with dangerous and deadly weapons, to wit: a sledgehammer, and a knife, and another sharp instrument or dagger * * * a wooden table leg, and other blunt instruments * * * and their fists and hands and feet * * * strike, hit, stab, cut, beat and stomp" and thereby kill Donnell. The testimony was that Kenton held Donnell while Laster stabbed him with an ice pick, Stidham "slashed" him with a knife, and two others hit him in the head with a sledgehammer. In addition to other bruises and contusions an autopsy on Donnell's body revealed "a severe mashed in, or compressed area in the right side of the face approximately just underneath the right eye, that extended back, involving the right ear with separation of the lower part of the ear, lower part of the ear was torn away from the body about a third of its normal attachment area." There was a multiple, crashing, "eggshell type fracture" of the skull, two knife-cut wounds of the neck, five puncture or stab wounds in the chest and four stab wounds in the back. The doctor said that two of the stab wounds had entered the heart cavity and of course were fatal. The testimony showed that until the three doors to Death Row were forced and Stidham and Laster released and Stidham furnished a knife DeLapp led the group bent on killing Donnell. As soon as Stidham was released DeLapp put his arm around Stidham's shoulders and said, "Gentlemen, I have brought you this far, this is your leader from here on." And shortly this group gained entrance to Donnell's cell and killed him. Prior to the riot Stidham had repeatedly threatened to kill both Donnell and James M. Creighton.

[1] This briefly narrated record completely refutes the appellant's claim of an invasion of due process in

submitting "a crime not included in the indictment." The indictment did not in terms charge the misdemeanor offense of conspiracy (RSMo 1959, §§ 556.120, 556.130, V.A.M.S.), even though inherent in the circumstances it may have been an incidentally included offense. Principal instruction number 4 hypothesized that the seven named defendants "entered into a conspiracy and agreement" and "acting in concert and together" and "aided, abetted, assisted or encouraged" in slaying Donnell but, as indicated, the evidence supports the hypothesis. There was a separate conventional instruction defining "conspiracy" stating that "all persons are principals who are guilty of acting in concert and together in the commission of a crime."

[2] The latter instruction was not only warranted by specific statute (RSMo 1959, § 556.170), upon this record, as the court held on the previous appeal, State v. Stidham, 305 S.W.2d l. c. 15, "there was ample evidence for a finding of the conspiracy submitted and the actual participation in and consummation of the said conspiracy by the persons named in the instruction." A case directly in point in every respect is State v. Holloway, 355 Mo. 217, 195 S.W.2d 662, an instance of a murder in a jailbreak. Excerpting, the court said, "Goldie and Buster were co-conspirators with appellant. Their testimony was competent in establishing the fact of the common design or conspiracy. * * * Conversations between Goldie and Buster were competent evidence against appellant although made outside of appellant's presence. * * * Furthermore, *proof that appellant and others conspired together to commit an unlawful act and that the killing occurred in furtherance of the conspiracy may be shown under an indictment or information charging first degree murder only.*" (Emphasis supplied.)

Relying on Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217, appellant contends that due process was violated in that the state knowingly used perjured testimony. This assignment is leveled at the state's use of Herman Trout and James Creighton, also prison inmates, as witnesses. (For a partial review of Creighton's bizarre life from a sentence of death in 1932 to a commutation of prison sentence in 1956 see State v. Creighton, 330 Mo. 1176, 52 S.W.2d 556.) The argument now is directed solely to the fact that the sentences of Creighton and Trout have been commuted and they have been released from prison. In the trial of this cause there was first a motion to disqualify Creighton as a witness upon the allegation that he was of unsound mind. That motion was heard at length, all medical and psychiatric records from the State Hospital at Fulton were introduced, and the court found as was all but obvious that he was indeed not incompetent as a witness. See State v. Stidham, 305 S.W.2d l. c. 13. Upon the original trial and appeal it was sought to establish the claim of perjured testimony or incompetent witness by offering to prove that while Creighton was held in the Cole County jail he was granted special favors, particularly that "he had access to one Mary Annis" (305 S.W.2d 7) despite the appellant's proof from the Fulton Hospital records that Creighton "is a homosexual."

[3] In any event and apart from the federal cases, this court has long since "recognize(d) that a judgment obtained by the knowing use of perjured testimony should be vacated upon a proper factual showing." State v. Garton, Mo., 396 S.W.2d 581. The insuperable difficulty with this particular claim of infringement of due process is that it is not supported by the record. Annotation 3 L.Ed.2d 1991. The only circumstance now present as to both Creighton and Trout is the fact that in July 1955 they did testify as state's witnesses and subsequently

their sentences were commuted by the then Governor of Missouri. And again, on this issue, there was a hearing on the 27.26 motion and aside from the bare fact of the commuted sentences the court found as did another court in 1964 (State v. Stidham, 403 S.W.2d 616) that "(t)he record is barren of facts to support such allegations." It is not necessary to detail their testimony, their evidence and that of numerous other witnesses is all set forth in the appeals of at least five of the participants in Donnell's slaying. On the 27.26 hearing the trial court could have added, after reading the record in Stidham's original appeal, that the testimony of Creighton and Trout was cogently corroborated in every detail by a number of physical facts and by other witnesses, particularly by the prison guard, Mr. Dietzel, on duty in Death Row when Donnell was murdered. In contrast to the testimony of Creighton and Trout there is no corroboration whatever of Stidham's testimony that he went up to B-Hall and spent the night of the riot innocently listening to the radio, had no knowledge of Donnell's slaying and took no part in the riot. The one incriminating circumstance that even he has never and cannot brush away is the conceded fact that after the three doors to Death Row were broken open and after his cell was unlocked he, unlike others and undoubtedly contrary to prison rules, did leave Death Row. Thus upon this record there was no support for the charge of knowing use of perjured testimony.

A further due process point is the claim of the "court's failure to make timely appointment of counsel." Here the appellant relies upon Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 and other landmark cases dealing with the appointment of counsel. It is not necessary here to again examine those cases, their standards

are recognized and applied even though the Miranda and Escobedo cases are not retroactive. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882. There is no factual similarity in this and any of the cited cases, particularly, for example, as in White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193, and Arsenault v. Massachusetts, 393 U.S. 5, 89 S.Ct. 35, 21 L.Ed.2d 5, in which there were pleas of guilty at the preliminary or "at a probable cause hearing" and the pleas were introduced in evidence upon the jury trials. In certain instances in which there has been manifest injustice, this jurisdiction recognized the importance of the right to counsel long before Escobedo and Miranda. See Ex parte Stone, Mo.App., 255 S.W.2d 155; State v. Jackson, 344 Mo. 1055, 130 S.W.2d 595 and State v. Witt, Mo., 422 S.W.2d 304.

The appellant's complaint as to counsel arose in and for the most part is based upon these circumstances: Initially the prosecution of these seven defendants for this particular offense was instituted by the prosecuting attorney in a magistrate court and preliminary hearings were held, a necessary prerequisite and procedure before a formal information could be filed in the circuit court. RSMo 1959, § 544.250. Appellant and his counsel make much ado of the fact that at one of these preliminary hearings he demanded counsel and yelled out asking for some lawyer to come forward. In his brief it is said that there was no appointment of an attorney "until the second arraignment" and in this connection stated that he was never advised of his right to a lawyer—even though he requested one at the preliminary—and that he was entitled to counsel before his mental examination at the United States Medical Center in Springfield.

[4] The basic fallacy in the appellant's contention on this phase of the case is that again there is no factual

basis for his claim of an infringement of rights at a preliminary. In the first place there is neither claim nor proof that anything done or said at any preliminary hearing or in any medical or mental examination was employed against him or that the state even secured any relevant information. State v. Smith, Mo., 411 S.W.2d 208. But more important and decisive here as to counsel at a preliminary hearing is the fact that Stidham was not prosecuted by information. On November 23, 1954, a grand jury returned an indictment charging Stidham and his accomplices with the murder of Donnell. Thus there was no occasion or place for a preliminary hearing. "It is a well-established law of this State that the grand jury may investigate and indict one charged with a felony although he has been arrested and held for a preliminary examination, and is not bound to await the action of the examining court, for the reason that the action of the examining court is no bar to the right of the grand jury to inquire into the case and indict the accused, even though he has been discharged on the preliminary examination." State v. Gieseke, 209 Mo. 331, 339, 108 S.W. 525, 527.

[5] As a matter of fact, other than appellant's assertions, there is no record support for his charges of lack of counsel prior to trial. Whatever may have occurred at any preliminary has not been made a part of this record. In any event, as stated, an indictment was returned, the defendants, the indisputable record recites, were duly arraigned, each defendant was furnished a copy of the indictment and upon the request of Stidham for the appointment of a certain lawyer, the court appointed Mr. Hennelly. Thereafter there were no motions or proceedings or even references to a preliminary hearing or to anything that may have occurred during such a hearing. Mr. Hennelly was appointed to represent appellant on November

23, 1954, and on December 6, 1954, a formal plea of not guilty was entered. Almost immediately, on December 14, 1954, on Stidham's behalf, there were motions for production and inspection of any statements that may have been given, a motion to dismiss for the reason of two offenses—homicide and assault with intent to kill, a motion for a severance, a motion for a polygraph examination and a motion to suppress any statement he may have given. These procedures were all considered in turn and disposed of, including a motion for a continuance and finally an application for a change of venue. The cause proceeded to trial and in the first instance a mistrial was declared when it was discovered that certain jurors were reading newspaper accounts of the trial. In the present 27.26 proceeding, after an unrestricted hearing, the court found these issues with respect to counsel against appellant, that is the court found that failure to appoint counsel at any preliminary stage of the cause or during his interrogation by police and prison authorities had not infringed any of appellant's constitutional rights and that finding is convincingly supported by the record. State v. Donnell, Mo., 430 S.W.2d 297; Crosswhite v. State, Mo., 426 S.W.2d 67. As a matter of fact appellant's interrogation in connection with the prison riot and Donnell's slaying is more appropriately considered in connection with his assertion of involuntary confession.

There is a threefold assignment of error in this respect, neither of which would necessarily result, as the appellant seems to think, in his exoneration and release from imprisonment. It is first urged in general terms that the court erred in admitting in evidence exhibit 16, his own handwritten confession. It is said that its admission deprived appellant "of his liberty without due process of law." This allegation is not a briefed and argued point; in connection with it, however, it is contended that the court's

procedure for determining voluntariness "did not comport with the minimum standards" of due process in that "no specific finding of voluntariness was made by the judge prior to submitting the issue to the jury." In the second place it is said that under the evidence "the alleged confession was coerced, involuntary, and taken in violation of the defendant's Constitutional rights," meaning presumably, that upon the record the confession was involuntary as a matter of law. A third and connected point is that the instruction submitting the issue to the jury was erroneous "by failing to properly instruct the jury on the Constitutional standards to be used in making their determination as to the voluntariness" of the confession. The latter point is not too clear—in some aspects it would seem to say that a question of law should have been submitted to the jury. In the argument of this contention, presented as a separate point, it is said that the jury was given an "unconstitutional standard." At another point it is said that the instruction failed to include or submit "mental coercion or duress" and, therefore, under State v. Williams, Mo., 369 S.W.2d 408, was prejudicially erroneous. Thus the complete gamut of involuntary confessions is sought to be invoked one way or another.

It is necessary at this point and as to all claims of involuntary confession to have some understanding of the record and the context and manner in which they arose. In this case, in addition to all other motions, there was a separate motion to suppress "any and all statements," oral or written, that Stidham may have made for the specified reason that the "alleged statements were involuntary and *as a result of physical force and threats of physical force applied against this defendant* by police officers of the City of St. Louis, guards of the Missouri State Penitentiary and officers of the Missouri Highway Patrol." (Emphasis sup-

plied.) That motion was filed on December 14, 1954, and the record recites that it was overruled on December 20, 1954. That motion was filed and passed on while the cause was pending in Cole County and it does not appear just what if any evidence was heard before the court passed on the motion. Thereafter, when in the course of the trial in July 1955 it appeared for the first time from the testimony of a highway patrol sergeant that Stidham's oral and written confessions were to be employed defendant's counsel, even in 1955, and unlike in State v. Williams, "moves the Court to conduct a preliminary examination and asks the Court to inquire into the voluntariness of the statement, and to determine whether the statement was given voluntarily, either the oral or the written statement." Thereupon the court interrupted the trial and out of the jury's presence and hearing conducted a hearing on appellant's motion.

Highway patrol officers, St. Louis police, prison officials and all others present when Stidham's statements were made or given were examined at length and in detail as to the circumstances in which they were given. It is not necessary to detail the circumstances. Stidham in testifying upon the trial and the motion said that after he was taken to the field house in the recreation area where the investigation into the riot and, incidentally, Donnell's murder, was being conducted, he was handcuffed, "a rope (was fastened) between the handcuffs * * * I was lifted up in the air where all my weight had to bear on my two arms." He said that the police officers and patrol officers, fifteen to twenty, left him thus suspended from the ceiling for fifteen minutes and then because he refused to give a statement they again lifted him up and beat him with cork ball bats until he passed out. And, he said, that as a result of this treatment "I agreed to write a statement that they dictated to me."

And so after his oral statements and despite his paralyzed arm he wrote the statement and the officers, unspecified, forced him to sign it.

[6-8] Contrary to Stidham's testimony the several officers who took part in the interrogation, accounted for Stidham's presence, every minute of time, and his treatment from the time on September 22nd he was moved from Death Row to O-Hall and finally on September 27th when he was escorted from O-Hall to the recreation area and his interrogation which lasted less than thirty minutes. Incidentally Stidham was confined in solitary in Death Row as punishment and for safekeeping because of an attempt to escape the previous January. Creighton was likewise an incorrigible and confined in Death Row, a maximum security area, as punishment. And the inference is that Donnell, thought by the prison population in general and Stidham and his friends in particular to be a snitch was confined there for his personal safety. In any event, the officers, one by one, denied the use of force, threats or violence. Donnell was murdered on September 22nd and the officers say that except in passing Stidham was not questioned until he gave the statements on September 27th. He claims, however, that when he was moved to O-Hall he was placed in a bare cell, without running water, that the windows were broken and he was only allowed "to keep a pair of pants and shoes on" and he said that he was not "given any food or water for three days." All of this testimony was denied by the prison authorities even though during a part of the time order had not been restored and some buildings were still burning. Without narrating even briefly, the testimony in contradiction of Stidham's uncorroborated claims was all but overwhelming and even giving some credence to his version the circumstances do not approach those of Brooks v. Florida, 389

U.S. 413, 88 S.Ct. 541, 19 L.Ed.2d 643, which "case documents a shocking display of barbarism." And again, after overruling the latter motion to suppress, all these witnesses testified to the same facts and circumstances and upon this testimony the issue of voluntariness was submitted to the jury. There was in point of fact upon the trial of the cause no claim of mental coercion, the claim was that the oral and written confessions were obtained by physical force and violence. And this is what Mr. Hennelly argued to the jury, it was not until his 27.26 hearing, thirteen years later, that there was a claim of mental duress. In these circumstances, as upon the original appeal, the then conventional instructions on voluntary confession were not prejudicially erroneous. State v. Laster, 365 Mo. 1076, 293 S.W.2d 300; State v. Stidham, Mo., 305 S.W.2d l. c. 16-18.

[9] In view of the insistent argument one other matter should be noted. In addition to his oral statements this is Stidham's confession, admittedly written by him:

> "Kenton held Donald while Laster stabbed him several times with a ice pick, at the same time I slashed at him three or four times around the face and neck with a knife that Kenton gave me when he opened the door, when Donald fell to the floor Linder and Thompson each said get Donald with the sledge and they proceeded to hit him with a sledgehammer and crowbar; during this time someone was holding a flashlight that Kenton previously had. When we left the cell Donald was lying on his back with his head pointed toward the door. The knife I had was a regular kitchen knife about six or seven inches in length, when I got back upstairs in B-Hall, I threw the knife on the floor near the west end on the south side of the building."

In this statement, according to the appellant, there are three errors which he says demonstrate that the six officers signing as witnesses dictated the statement thus conclu-

sively establishing that the statement was not voluntary. The statement recites his age as 25 when in fact, as shown by his birth certificate, he was 28. His residence was given as Kansas City when in fact he had not lived there and, three, although not to be found in the statement that he was credited with three prior felony convictions when in fact he had but two—one, he says, having been "nullified." The officers all say that they had no personal knowledge of these items except as Stidham wrote them in his statement. And to further confuse this issue when he was in the medical center in Springfield the documents he introduced in evidence show that in two instances he gave his age as 32. If these details are of any significance upon the issue of voluntariness it could be pointed out that in the statement Creighton's name is misspelled "Crayton" and repeatedly Donnell's name is misspelled "Donald" and he does not claim that the officers directed him to thus misspell these names. And more significantly as to the slaying of Donnell, the statement says that "Paul Kenton unlocked my door" but upon his 27.26 hearing, years later, he says "It was some colored fellow. I don't remember who it was. I think it was Ford." Thus not only is there a direct conflict in the testimony, upon the appellant's own version there looms a large credibility gap. And in this connection, by the time Stidham was brought to the interrogation center on the 27th of September there was but little point in obtaining a statement, let alone a confession, from him. By that time the guards had all been released from the rioters' custody and the cells, particularly Mr. Dietzel, and they along with Stidham's co-defendants had supplied all the details of the riot as well as the killing of Donnell. By the time Stidham gave his statements there was no mystery as to Donnell's death or as to Stidham's part in it and upon this record the statement played but little if any part in his conviction.

All that has gone before in this opinion is but background and preliminary to appellant's principal claim that the trial of his case, particularly as to his oral statements and his confession, does not meet the standards of Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908; Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895; Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; Brooks v. Florida, supra, and numerous other landmark federal cases concerned with the subject of voluntary confessions. It is not necessary here to attempt an explication of these cases, that has been done several times and their mere citation indicates an awareness of their significance and controlling force. One of the latest explications of these and numerous other cases is Parker v. Sigler, 413 F.2d 459 and it is sufficient here to say that the interpretation of the Eighth Circuit Court of Appeals is accepted.

[10] The first and basic weakness of appellant's presentation is his failure to recognize that unlike Jackson v. Denno this jurisdiction does not apply or follow the so-called New York rule in determining the voluntariness or involuntariness of confessions, Missouri employs the so-called Massachusetts procedure "impliedly approved in Jackson v. Denno," State v. Washington, Mo., 399 S.W.2d 109, 114. Upon the trial of this case, after the appellant's motion and the indicated hearing before the court, out of the jury's hearing, the court made this order: "* * * it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opin-

ion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that *the statement is and should be admissible in evidence.*" Only a single word is missing, the court unfortunately did not in the italicized clause employ the word "voluntary," nevertheless, the meaning and intent are implicitly plain. "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." Sims v. Georgia, 385 U.S. 538, 544, 87 S.Ct. 639, 643, 17 L.Ed.2d 593, 598. It is not necessary to again detail the conflicting evidence and demonstrate, as indicated from even a brief recitation upon the "totality of the circumstances" (Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423) the judge's finding of voluntary confession, prior to submission to the jury, was indeed supported by cogent and convincing testimony. State v. Hester, Mo., 1425 S.W.2d 110; Crosswhite v. State, Mo., 426 S.W.2d 67; State v. Williams, Mo., 416 S.W.2d 956; State v. Glenn, Mo., 429 S.W.2d 225.

And if this does not suffice, thirteen years later, upon the 27.26 hearing the appellant was again given full opportunity to attack the previous finding and record and he did so but the court on change of venue found the issues against appellant. It may be interpolated that upon the latter hearing he for the first time attempted to inject the issue not alone of a confession produced by "police brutality" but of mental duress and coercion. But here he attempts to connect the murder of Donnell and the events of September 22 and 27, 1954, with his prior confinement and general treatment for infraction of rules and attempt-to-escape events and treatment completely disassociated with the riot and slaying. Needless to say, these are "scarcely factors of involuntariness in a plea." Verdon v. United States, 8 Cir., 296 F.2d 549, 552. But again and

upon this issue and in the new 27.26 hearing the patrol, police and prison officials were again called, including Patrolman Barton whom Stidham had accused as one of his tormentors and he denied that he ever at any time interrogated or handled Stidham, although he had talked to Creighton, Trout, Laster, Noble, Hoover, DeLapp and Vidauri. In any event all these witnesses, all produced by the state, categorically or implicitly refuted all of Stidham's claims of mistreatment, either physical or mental. And upon this new hearing and record another circuit judge made another complete finding of law and fact. The court found, citing the Glenn and Washington cases, supra, that Judge Randolph Weber in 1954 had "followed the correct procedure in determining the issue of voluntariness of the confession and specifically made a finding relative thereto and this Court now so finds that the correct procedure was utilized." And finally the court found, as had the previous court, that the oral and written confessions were voluntary and, needless to add, the latter finding is overwhelmingly supported and procedurally and factually the cause meets all the requirements of the federal cases and there has been no invasion of due process. Crosswhite v. State, State v. Glenn and State v. Williams, supra.

Accordingly the original judgment, State v. Stidham, Mo., 305 S.W.2d 7, is affirmed and the judgment in the 27.26 proceeding is likewise affirmed.

STOCKARD and PRITCHARD, CC., concur.

PER CURIAM:

The foregoing opinion by BARRETT, C., is adopted as the opinion of the court.

All of the Judges concur.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JAMES WILLIAM STIDHAM, Petitioner,
vs.
HAROLD R. SWENSON, Respondent.
Civil Action No. 18121-2

Memorandum and Order Denying Petition for Habeas Corpus

(Filed May 15, 1970)

Petitioner is an inmate of the Missouri State Penitentiary serving a sentence of life imprisonment upon conviction of a first-degree murder. Petitioner filed a petition for habeas corpus asserting that his conviction is void because it was rendered without due process of law and in violation of the Fifth, Sixth, and Fourteenth Amendments.

In May, 1952 petitioner was sentenced to a 25-year term in the Penitentiary for robbery. While serving his term, he was accused and convicted in 1955 of killing another inmate, for which he was sentenced to a life term. Petitioner appealed his conviction which was affirmed by the Supreme Court of Missouri in 1957. See 305 S.W. 2d 7. In 1964 he filed a 27.26 motion to vacate his sentence which was denied without an evidentiary hearing. On appeal, the Missouri Supreme Court affirmed. See 403 S.W. 2d 616. Thereafter, petitioner filed a second 27.26 motion alleging new grounds, which was also denied without an evidentiary hearing by the trial court. The Supreme Court of Missouri reversed and remanded on appeal (415 S.W. 2d 297) and

on December 5, 1968, an evidentiary hearing was held in the St. Louis City Circuit Court. This hearing resulted in a denial of relief under the 27.26 motion, which judgment was appealed to the Supreme Court and consolidated with another appeal for hearing by the court en banc. The Supreme Court on February 9, 1970 affirmed the decisions of the lower courts. 449 S.W. 2d 634.

Petitioner then filed a petition for habeas corpus in this Court, and on March 2, 1970, a show cause order was issued, since it appeared that petitioner had exhausted his available state remedies and might have stated a violation of one or more of his federally protected rights. The respondent filed with this Court, in response to the show cause order, the transcripts of the records on appeals (Missouri Case Nos. 45537 and 54674), briefs and arguments of the parties, and the opinions of the Supreme Court of Missouri. It appears to the Court that this record is complete and that it fully demonstrates that the petitioner has exhausted his available state remedies.

The petitioner alleges seven grounds for relief: (1) that he was tried and convicted upon a charge of conspiracy which was not included in the indictment; (2) that he was deprived of assistance of counsel at two critical stages of his trial; (3) that he did not knowingly or competently waive the assistance of counsel at any stage of the proceedings against him; (4) that certain members of the Missouri State Highway Patrol and personnel of Missouri State Penitentiary exerted physical and mental punishment upon him to secure a confession from him; (5) that the trial judge admitted the confession into evidence without first making a clear and specific finding that the said confession was voluntary; (6) that Instruction No. 6 given at the trial did not fully set out the constitutional standards for the jury's guidance to determine the voluntariness of the said con-

fession; and (7) that the State of Missouri knowingly used perjured testimony of two convicts to obtain the conviction of petitioner.

The facts are fairly well set out in *State* v. *Stidham*, 305 S.W. 2d 7. Very briefly, in 1952 petitioner was sentenced to 25 years' imprisonment for his part in the armed robbery of Grapette Bottling Company in Joplin, Missouri. (See *State* v. *Stidham*, 258 S.W. 2d 620.) On October 3, 1955, after a jury verdict of guilty, petitioner was sentenced to life imprisonment for his participation in the murder of a fellow inmate, Walter Donnell, on September 22, 1954, during the riot of 800 prisoners in the Missouri State Penitentiary.

Petitioner's first contention is that the state was allowed to prove and the jury instructed upon the charge of conspiracy to murder which was not included in the indictment. The indictment did not charge conspiracy; but it did charge seven persons with the murder of Donnell. Even though petitioner and the other named defendants were granted severances, the indictments in each trial named all seven of them. Further, the evidence showed that the defendants had acted in concert. An objection was leveled against Instruction No. 4 because it hypothesized that each had entered into a conspiracy and had acted in concert and "aided, abetted, assisted or encouraged" in the slaying. Under Missouri law all persons who are guilty of acting in concert in the commission of a felony are considered principals and are charged, tried, convicted and punished in the same manner. (See V.A.M.S., § 556.170.) There is no merit to the claim that murder and conspiracy to commit murder (which was in fact accomplished) are such different charges that petitioner could not have been prepared to defend himself. Furthermore, there is direct authority for instructing and proving a con-

spiracy to commit murder under an indictment charging first-degree murder. *State* v. *Holloway*, (Mo. Sup.) 195 S.W. 2d 662 (cited by the Missouri Supreme Court) states:

> (P)roof that appellant and others conspired together to commit an unlawful act and that the killing occurred in furtherance of the conspiracy may be shown under an indictment or information charging first degree murder only.

Petitioner next contends that he was deprived of effective assistance of counsel at two critical stages of his trial and that he did not knowingly or competently waive such assistance at any time. These times were while he was being interrogated by the police and at his first arraignment.

Factually, there were two arraignments. The first was instituted by the prosecuting attorney on an information in the magistrate court. There petitioner demanded counsel, and shouted out in the courtroom for counsel, but his request was denied. A plea of not guilty was entered for petitioner. Preliminary hearings were held as required by V.A.M.S., § 544.250. Petitioner was later rearraigned on an indictment returned by the grand jury of Cole County, and at that time counsel was appointed for him. Petitioner contends that this late appointment of counsel resulted in the denial of effective assistance of counsel under the standard of *Powell* v. *Alabama*, 287 U.S. 45.

The failure to appoint counsel at interrogation has been established as a denial of due process by *Escobedo* v. *Illinois*, 378 U.S. 478, and *Miranda* v. *Arizona*, 384 U.S. 436. However, these cases are not retroactive (*Johnson* v. *New Jersey*, 384 U.S. 719) and do not control here.

The more serious question concerns the failure to appoint counsel at the time of the first arraignment, which

petitioner claims resulted in denial of due process. Petitioner cites *Hamilton* v. *Alabama*, 368 U.S. 52, *White* v. *Maryland*, 373 U.S. 59, and *Arsenault* v. *Massachusetts*, 393 U.S. 5, as authority. The Missouri Supreme Court in their opinion 449 S.W. 2d 634 distinguished the latter two cases by stating that "(t)here is no factual similarity in this and any of the cited cases . . . (citing *White* v. *Maryland, supra*, and *Arsenault* v. *Massachusetts, supra*) in which there were pleas of guilty at the preliminary or 'at a probable cause hearing' and the pleas were introduced in evidence upon jury trials." However, in *Hamilton* v. *Alabama*, from which the holdings in *White* and *Arsenault* were drawn, the petitioner, at arraignment without counsel being appointed, pled not guilty. The Supreme Court held that the arraignment is a critical stage in a criminal proceeding, and the failure to appoint counsel to represent the defendant at that time is a denial of due process. The court stated at page 55:

> When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. (Citing cases.) In this case . . . the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.

The respondent and the Missouri Supreme Court opinion state that no infringement of rights occurred for two reasons. The first is that "There is neither claim nor proof that anything done or said at any preliminary hearing or in any medical or mental examination was employed against [Stidham] or that the state even secured any relevant information." (448 S.W. 2d at 639.) More decisive, according to the court, is the fact that Stidham was not prosecuted by information (under which the preliminary hearings had been held) but rather by an indictment re-

turned on November 23, 1954. "Thus there was no occasion or place for a preliminary hearing." Petitioner, along with his six co-defendants, were arraigned under the information on September 29, 1954; the information was dismissed and the indictment was returned on November 23, 1954. On this date counsel was appointed, and petitioner was rearraigned with the presence of counsel on December 6, 1954.

The important question is whether the arraignment and preliminary hearing are critical stages in the proceedings in Missouri. Under Missouri law, a defendant is not required to assert any right, plea or defense at the arraignment in order to preserve any statutory or constitutional rights. (V.A.M.S., § 546.020) Moreover, all rights, pleas or defenses are preserved inviolate. In *State* v. *Benson*, (Mo. Sup.) 415 S.W. 2d 773, it was held that the absence of counsel during arraignment is not, per se, a violation of the Sixth Amendment. In *Madison* v. *Tahash*, (C.A. 8) 359 F. 2d 60, the court held that the arraignment was not a critical stage of the criminal proceedings in Minnesota. *Donnell* v. *Swenson*, (W.D. Mo.) 302 F. Supp. 1024, extended the *Tahash* holding to cover arraignments in Missouri.

In *State* v. *Patrick*, (Mo. Sup.) 420 S.W. 2d 258, the preliminary hearing was held not to be a critical stage. This view is also supported by *Pope* v. *Swenson*, (C.A. 8) 395 F.2d 320, 322, in which the court stated, "We agree that denial of counsel at the preliminary hearing under Missouri law was not a constitutional infirmity in Pope's conviction, where the defendant pleaded not guilty and was otherwise not shown to have been prejudiced." See also *Nolan* v. *Nash*, (C.A. 8) 316 F. 2d 777; Cf. *Burnside* v. *State of Nebraska*, (C.A. 8) 346 F. 2d 88; *Holland* v. *State of Nebraska*, (C.A. 8) 416 F. 2d 1007.

Petitioner in this case did not plead, and, pursuant to V.A.M.S., § 546.020, a plea of not guilty was entered for him. At the second arraignment, petitioner pleaded not guilty, was furnished a copy of the indictment and, upon his request for a certain lawyer, the court appointed that attorney who represented him thereafter. Petitioner raises no complaints about the efforts of the attorney in his behalf. Petitioner has not shown that he was deprived of any rights by the failure to appoint counsel at the first arraignment, and, therefore, in line with the Eighth Circuit Court of Appeals, we hold that the failure to appoint counsel at that time was not a deprivation of rights.

Petitioner further asserts that the state knowingly used perjured testimony of two witnesses against him. The state used two prison inmates, Herman Trout and James Creighton, to testify; as proof of perjury, petitioner states that both prisoners had their sentences commuted and were released from prison on the same day.

In making such an allegation, the burden of proof is on petitioner to show both that the testimony was perjured and that such testimony was knowingly and intentionally used by the prosecuting attorney in order to obtain a conviction. *Anderson* v. *United States*, (C.A. 7) 403 F. 2d 451; *Smith* v. *State of Florida*, (C.A. 5) 410 F. 2d 1349, and cases cited therein; *Enzor* v. *United States*, (C.A. 5) 296 F. 2d 62; *United State* v. *Jenkins*, (C.A. 3) 281 F. 2d 193. The petitioner has not met this test. His allegations and the record are devoid of any proof of perjury or willful use of perjury by the state. Furthermore, petitioner concedes that he has no direct proof, but contends that the circumstantial evidence, that of commutation of sentence less than six months after Stidham's trial, is sufficient proof to indicate perjury in line with *Napue* v. *Illinois*, 360 U.S. 264. That case is not controlling here because there

was express proof of a "deal" between the prosecutor and witness in the case. Here there is no such proof.

Petitioner's three remaining contentions relate to the issue of voluntariness of his confession. He asserts that he was coerced by physical and mental punishment to confess, that the confession was admitted without a finding by the trial judge that it was voluntary, and that the instruction given at the trial did not fully set out the constitutional standards for the jury's guidance in determining the issue of voluntariness.

In regard to petitioner's first allegation, he relies mainly upon the cases of *Clewis* v. *Texas,* 386 U.S. 707, and *Davis* v. *North Carolina,* 384 U.S. 737. Both cases use the criterion of "totality of circumstances" in determining whether the confessions were voluntary. The respondent and the Missouri Supreme Court opinion lend little credence to Stidham's testimony because "Without narrating even briefly, the testimony in contradiction of Stidham's uncorroborated claims was all but overwhelming . . ." This not unexpected. The Supreme Court in both *Clewis* and *Davis, supra,* commented, "As is almost invariably so in cases involving confessions obtained through unobserved police interrogation, there is a conflict in the testimony as to the events surrounding the interrogation."

It is necessary to review the uncontroverted facts in order to determine this issue. The murder was committed on September 22, 1954 and Stidham confessed on September 27, 1954. He was questioned intermittently up until that time concerning his part in the murder. He had very little food and very little sleep. At no time during this period was he informed of his right to counsel or to remain silent. In fact, he asserts that an attempt to get an attorney was thwarted when the prison authorities refused to allow a letter to be mailed. On the 27th, Stidham was

taken to the Athletic Building and questioned by a number of officers who had hand guns and riot guns in their possession. Stidham asserts that he was physically abused and rendered unconscious at this time, and these acts resulted in his confession. Before and after the interrogations Stidham was in solitary confinement and no visitors, including parents or priest, were allowed to see him. Other uncontradicted facts indicated that Stidham was deprived of food for two days after his confession and that he lost 25 pounds during the period of interrogation.

He had consistently denied all involvement in the murder up until the time of his confession.

The most damaging of the factors considered in the totality of the circumstances is the failure to inform petitioner of his rights. *Miranda* v. *Arizona*, 384 U.S. 436, has been determined not to be applicable retroactively. (See *Johnson* v. *New Jersey*, 384 U.S. 719.) However, it still remains that the failure to inform is a significant factor in determining the issue of voluntariness, although it is insufficient in itself to require the voiding of the confession. Wholly apart from the disputed facts, the statement of facts established by the record and as found at Stidham's 27.26 evidentiary hearing do not lead to the conclusion that such pressures were applied to Stidham as to result in overcoming his will to maintain his innocence.

Petitioner next attacks the procedure used by the trial court in determining the voluntariness of the confession, alleging that it is in violation of *Jackson* v. *Denno*, 378 U.S. 368. In that case, a constitutional rule was established that a jury was not to hear a confession unless and until the trial judge had determined that it was freely and voluntarily given. In *Sims* v. *Georgia*, 385 U.S. 538, the court further extended this holding at page 544:

> The rule allows the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of a defendant but it is not for the jury to make the primary determination of voluntariness. Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity.

Here, in accordance with a request of Stidham's counsel, the trial court conducted a preliminary examination inquiring into the voluntariness of the confession outside of the hearing of the jury. Witnesses were called and cross-examined. This hearing satisifed the requirement of *Jackson* v. *Denno, supra,* that there be a (1) reliable nonjury preliminary or post conviction determination of the issue of voluntariness, (2) uninfluenced by the truth or falsity of the confession (3) by procedures "fully adequate to insure a reliable and clear-cut determination, including the resolution of disputed facts upon which the voluntariness issue may depend."

At the conclusion of the testimony, the court made the following statement:

> THE COURT: Now, at the conclusion of the hearing held outside of the hearing of the Jury, the request by the Defendant for a hearing upon the statement which has been identified as—
>
> MR. RILEY: 16 and 16-1.
>
> THE COURT: 16 and 16-1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the

Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted, so we may proceed with Sergeant Little, as to his identification before the Jury of the statement in question, Exhibit 16 and 16-1.

MR. HENNELLY: In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?

THE COURT: That is right. Mr. Sheriff will you bring the Jury back in?

If the trial court had simply stated that he found the confession was voluntarily made after hearing the many witnesses who testified on this score, the matter would have been settled and this point could not be raised in this Court. There are many cases holding that a ruling by the Court that the evidence heard "makes a jury issue of the matter," or words of similar import, do not satisfy the rule of *Jackson* v. *Denno, supra.* And so the precise question presented here is whether the Court did find the confession involuntary or whether he failed to rule on that point and decided to let that question be decided by the jury.

The evidence in this case on behalf of the defendant, which the judge heard, was that he was subjected to brutal physical torture to induce the confession. If the judge had believed even a part of his testimony, he would have undoubtedly held the confession involuntary. The trial court held a full-scale evidentiary hearing on the voluntariness of the confession, and without actually using the word voluntary, directly held that he believed the state's witnesses and did not believe the defendant's testimony. This reasoning was supported by the direct ruling that he was denying the request of defendant's counsel to hold that the contested statement was involuntary.

It would be highly technical, in this day and age, to hold that the word "voluntary" was a word of art and, in its absence, a conviction by a jury, after a long trial, should be set aside because the judge ruled the statement was not involuntary instead of ruling that the statement was voluntary. It is the opinion of this Court that the statements and action of the judge does clearly indicate a finding of voluntariness, and is sufficient under the teachings of *Jackson* v. *Denno, supra,* and *Sims* v. *Georgia, supra.*

The petitioner's third attack is related to the second. Basically, he contends that since the judge made no specific finding of voluntariness, his instruction which did not require them to make a specific finding on the voluntariness of the confession was violative of *Jackson* v. *Denno, supra.* Since we have held that the trial court reliably determined the issue of voluntariness, it was not necessary for the jury to make a specific finding thereon.

Therefore, it is

ORDERED that the petition for habeas corpus be, and hereby is, denied.

/s/ Wm. R. Collinson
District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,685

James William Stidham,
Appellant,
v.
Harold R. Swenson, Warden,
Appellee.

Appeal from the Judgment of the United States District Court for the Western District of Missouri Denying Appellant's Petition for the Writ of Habeas Corpus.

[May 24, 1971.]

Before GIBSON, HEANEY and BRIGHT, Circuit Judges.

HEANEY, Circuit Judge.

On September 22, 1954, an inmate of the Missouri State Penitentiary was beaten and stabbed to death by fellow inmates during a riot in that institution. An investigation was undertaken by the prison authorities immediately after the quelling of the riot. Written confessions were eventually obtained from several inmates, including James William Stidham. Stidham's confession was used against him in his 1955 trial in state court in which he was convicted of first degree murder.

Stidham made a number of attempts to obtain relief in Missouri courts on the ground that the trial judge did not find his confession to be voluntary, as required by *Jackson* v. *Denno*, 378 U.S. 368 (1964),[1] before submitting it to the jury. *State* v. *Stidham*, 305 S.W.2d 7 (1957); *State* v. *Stidham*, 415 S.W.2d 297 (1967); *State* v. *Stidham*, 449 S.W.2d 634 (1970). He was unsuccessful in each attempt.

On November 9, 1970, a habeas corpus petition brought by Stidham was denied by the United States District Court for the Western District of Missouri. The District Court found (1) that the trial court which initially tried Stidham had complied with *Jackson*, and (2) that on the basis of the undisputed facts adduced at the state trial and the subsequent state evidentiary hearing, the confession was voluntary. Stidham appeals from the denial.[2]

COMPLIANCE WITH JACKSON

At the initial trial, the state court heard evidence outside the presence of the jury on the voluntariness of the confession. At the conclusion of the hearing, the trial court stated:

> "* * * [I]t is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant

1. *Jackson* v. *Denno*, 378 U.S. 368 (1964), is retroactively applicable. *Desist* v. *United States*, 394 U.S. 244 (1969); *Parker* v. *Sigler*, 413 F.2d 459 (8th Cir. 1969), *rev'd on other grounds*, 396 U.S. 482 (1970).

2. Stidham also contends on appeal that he was denied assistance of counsel at two critical stages of his trial, that he was tried and convicted on a charge not included in his indictment and that the State of Missouri knowingly used the perjured testimony of two convicts in obtaining his conviction. We affirm the decision of the District Court on each of these issues for the reasons given in that court's memorandum opinion. *Stidham* v. *Swenson*, Civ. No. 18121-2 (W.D. Mo. May 15, 1970).

> has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted * * *
>
> "MR. HENNELLY [Defendant's counsel]: In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?
> "THE COURT: That is right. * * *"

The United States District Court found that this ruling comported with the requirements of *Jackson* v. *Denno*, *supra*, stating:

> "It would be highly technical, in this day and age, to hold that the word 'voluntary' was a word of art and, in its absence, a conviction by a jury, after a long trial, should be set aside because the judge ruled the statement not involuntary instead of ruling that the statement was voluntary. It is the opinion of this Court that the statements and action of the judge does clearly indicate a finding of voluntariness, and is sufficient under the teachings of Jackson v. Denno, supra, and Sims v. Georgia, [385 U.S. 538 (19....)]."

We believe that the District Court's analysis is incorrect. It assumes that Missouri law, at the time of Stidham's trial, required the trial court to find that a confession was voluntary before permitting it to be considered by a jury. Our examination of the Missouri case law convinces us that a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary.

The following statements of the Pre-*Jackson-Denno* Missouri procedure support this view:

"* * * [W]hen there is substantial conflicting evidence and the question is close it is better to refer the underlying issue of voluntariness to the jury than to exclude the confession, since there is less chance of a miscarriage of justice by leaving the question open to a second determination, before the jury on a rehearing of the evidence under proper instructions, than by foreclosing the inquiry. The court then can still exclude the confession if it finds from all the evidence, including that introduced at the preliminary hearing, that the same was involuntary. * * *"

State v. *Gibilterra*, 116 S.W.2d 88, 94 (1938).

"It is my view that we should adhere to the standard of admissibility of confessions of whether or not the particular confession is voluntary in fact. That has always been the rule of this Court. * * * [T]his is a jury question unless its involuntary character so conclusively appears that it must be held to be involuntary as a matter of law. * * * If the confession is voluntary in fact, and is true, the defendant's rights are not violated by putting it in evidence. Some one must determine these fact issues, and our system is to leave them to the jury, when they must be decided on conflicting evidence." (Citations omitted.)

State v. *Sanford*, 193 S.W.2d 37, 38 (1946) (concurring opinion).

"* * * Under our system of jurisprudence it is generally left to the jury to determine whether a confession was voluntary, unless the contrary appears so conclusively that the confession must be held involuntary as a matter of law. * * *" (Citations omitted.)

State v. *Laster*, 293 S.W.2d 300, 304 (1956).[3]

3. See also, *State* v. *Bridges*, 349 S.W.2d 214 (1961); *State* v. *Barnett*, 338 S.W.2d 853 (1960); *State* v. *Falbo*, 333 S.W.2d 279 (1960); *State* v. *Statler*, 331 S.W.2d 526 (1960); *State* v. *Phillips*, 324 S.W.2d 693 (1959); *State* v. *Bradford*, 262 S.W.2d 584 (1953); *State* v. *Cochran*, 203 S.W.2d 707 (1947); *State* v. *Ellis*, 193 S.W.2d 37 (1946).

Our analysis of the record of Stidham's trial leads us to conclude that the trial judge in this case submitted the voluntariness issue to the jury without making a prior factual determination that the confession was voluntary. His finding, that the confession was not "involuntary as a matter of law", was not, under the then existing Missouri law, the same as finding that it was voluntary. If the trial judge does not make a *factual* determination that a confession is voluntary before submitting it to the jury, *Jackson* standards are violated. *Parker* v. *Sigler*, 413 F.2d 459 (1969), *rev'd on other grounds*, 396 U.S. 482 (1970).

The Missouri Supreme Court's treatment of this issue on Stidham's appeals buttresses our view that the requirements of *Jackson* were not met. In its first *Stidham* opinion, 305 S.W.2d 7 (1957), the court stated:

> "There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted in evidence before the State established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, *found the issue was for the jury, and later, after hearing the evidence before the jury submitted the issue to the jury for determination.* * * * On the conflicting showing the issue of the voluntariness of the confession was for the jury. * * *" (Emphasis added.)

In its most recent *Stidham* opinion, 449 S.W.2d 634 (1970), the Missouri Supreme Court examined its procedure and determined that "* * * Missouri employs the so-called Massachusetts procedure 'impliedly approved in *Jackson* v. *Denno*' * * *". In doing so, the court relied upon *State* v. *Washington*, 399 S.W.2d 109 (1966). We point out that *State* v. *Washington* was decided after *Jackson* became the law, and a comparison of its standard with those enunciated in the Missouri cases, above cited, reveals the difference between the 1955 and 1966 standards.

THE VOLUNTARINESS OF THE CONFESSION

The Supreme Court recently reemphasized that a defective procedure, standing alone, is not a sufficient basis for habeas corpus relief:

> "[Our decisions][4] did not establish that an applicant for federal habeas corpus is entitled to a new hearing on the voluntariness issue, in either the federal or state courts, merely because he can point to shortcomings in the procedures used to decide the issue of voluntariness in the state courts. Our decisions make clear that he must also show that his version of events, if true, would require the conclusion that his confession was involuntary."

Procunier v. *Atchley*, . . . U.S. . . ., 27 L.Ed.2d 524, 529 (1971).

Stidham alleges: that he was returned to his regular Death Row cell in the early evening of September 22; that between September 22 and September 27, he was questioned intermittently by police officers and state troopers who threatened him with physical harm if he did not tell everything he knew about the murder; that between September 22 and September 27, he was able only to catch short naps while sitting on the toilet because his straw tick, on the floor, was too water-logged to be slept on as a result of his cell being flooded when rioting inmates opened water pipes; that he was given nothing to eat from September 22 until September 29; that he weighed 184 pounds before the riot but only 159 pounds on September 29; that he was never informed of his *Miranda* rights;[5] that on September 27, he was taken to the prison's

4. The Court was specifically referring to *Jackson* v. *Denno*, *supra*, and *Townsend* v. *Sain*, 372 U.S. 293 (1963).

5. Since the *Miranda* decision is not retroactive, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), this allegation, even if true, is not dispositive of the case. However, failure to warn of constitutional rights is a factor properly considered in determining the voluntariness issue. *Clewis* v. *Texas*, 386 U.S. 707 (1967); *Davis* v. *North Carolina*, 384 U.S. 737 (1966).

athletic field house and questioned in the presence of six police officers armed with pistols, rifles and riot guns; that he was questioned for approximately twenty to thirty minutes, during which time he denied involvement in the murder; that, thereafter, a rope was placed through his handcuffs and he was hung up for approximately fifteen minutes with his hands behind him; that upon his continued refusal to implicate himself, he was again hung up and beaten with corkball or baseball bats until he lost consciousness; and that he then wrote out a confession which was dictated to him.

We believe that the above version of the facts, if true, requires the conclusion that the confession was an involuntary one. See, *Brooks* v. *Florida*, 389 U.S. 413 (1967); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Brown* v. *Mississippi*, 297 U.S. 278 (1936).

We emphasize that we do not decide or intimate that the allegations are true. It is not the task of the federal court to do so in state habeas corpus matters:

> "* * * [T]he appropriate remedy when a federal court finds a Jackson v. Denno error in a prior state proceeding is to allow the State a reasonable time to make an error-free determination on the voluntariness of the confession at issue. * * *"

Sigler v. *Parker*, *supra* at 484.

We only note, as did the United States District Court, that we have examined the transcripts and other relevant materials and have found that several of Stidham's allegations have not been contradicted in the record.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings consistent with the remedy provided for in *Sigler* v. *Parker*, *supra*.

GIBSON, Circuit Judge, dissenting.

I respectfully dissent. Appellant Stidham has been accorded many hearings and with the aid of extremely able and expert counsel has raised just about every objection and defense available in the well stocked arsenal of defense tactics—this he has a right to do, but I do not think the never-ending search for error, fancied or otherwise, serves the cause of criminal justice. The Courts rather than spending limited judicial resources in open end legal proceedings should give heed to the many evils engendered in the law's delay and give adherence to the constitutional mandate for speedy trials. Only by unclogging the dockets can this be done. Much has been said and written about the inordinate delays, both at the trial and appellate levels, that have burdened and made ineffective to a large extent our system of criminal justice.

I would affirm on the basis that the Missouri Supreme Court has correctly enunciated the Missouri law applied in this case at the original trial and that Court's holding that the procedure in this case was compatible with *Jackson* v. *Denno*. *State* v. *Stidham*, 449 S.W.2d 634 (Mo. 1970). A State Supreme Court is the best interpreter of its own laws. In addition, a review of the entire record of the original conviction, the record in the plenary hearing in the state post-conviction review, together with the federal post-conviction review in the federal District Court does not affirmatively demonstrate any ground for upsetting the jury verdict of 1954.

First as to the law, the preliminary inquiry into the voluntariness of the confession during the original trial of this case held by the trial judge out of the presence of the jury, I think, adequately satisfied the requirements of *Jackson* v. *Denno*, 378 U.S. 368 (1963). The failure of the trial judge to use the word "voluntary" instead of "not

involuntary" is a matter of semantics and too technical a basis upon which to upset a conviction affirmed by the highest state court. The jury is the ultimate trier of fact on the voluntariness issue if the confession is not involuntary as a matter of law. *Jackson* v. *Denno,* required a preliminary examination outside of the hearing of the jury on the issue of voluntariness. This was done.

The trial judge at the plenary preliminary hearing could only do one of two things; hold the confession involuntary as a matter of law and thus not admit it, or view it as not involuntary as a matter of law and admit it in evidence together with any evidence on the voluntariness issue that the accused wished to present. After all, the jury is the sole and only arbiter of the facts and only has to give the confession such weight as it deems merited. The trial judge could not say the confession is voluntary and instruct the jury that it must accept the confession and act accordingly.[1] The judge here made the only finding he could legally make to have the confession admitted into evidence for the jury's consideration; that is, it was admissible on the ground that it was not involuntary as a matter of law. This was a far cry from the limited and incomplete procedure condemned in *Jackson* v. *Denno.*

The argument here appears to be more a matter of semantics or technicalities than a substantial procedural defect in trial proceedings. The trial court's decision in admitting the confession was based on conflicting evidence, the same evidence that is now urged to upset the verdict and judgment of the state court. No new evidence has been adduced and we are in effect now being asked to

1. The trial judge could not tell the jury the confession was voluntary; that would constitute error in a Missouri state trial, be considered a fatal comment on the evidence and as invading the province of the jury.

review this same evidence and hold the procedure bad because the judge did not use the magic rubric "voluntary" but said in effect, as is clearly shown by the record, that the confession was admissible and not involuntary as a matter of law.[2] By refusing to hold that the confession and statements were involuntary, the Court in the context of this hearing would be holding that the confession and statements were voluntary. This particular preliminary hearing on the confession and statements was not held just to see if there was conflicting evidence, as under the New York rule held defective in *Jackson* v. *Denno*.

Second as to the facts, I agree with the majority that *Procunier* v. *Atchley*, . . . U.S. . . ., 27 L.Ed.2d 524 ( ), is not applicable to this case as the appellant would clearly be entitled to have the confession ruled inadmissible if his version of the facts is correct and, in addition, his conviction would be a travesty on justice if his version of the facts in the case is correct. The conflict of the evidence in this case carries throughout the confession and the other evidence adduced at the trial. The decision on the admissibility of the confession is solely predicated on credibility factors. The only evidence of a forced or involuntary confession comes from the mouth of the accused. All of the other evidence, including that of

2. At the conclusion of the preliminary hearing on the issue of the admissibility of the confession (and it would not be admissible if involuntary), the trial judge said,

> "It is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, * * * The defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence * * * that the statement is and should be admissible in evidence, subject to further examinations of the witnesses * * *."

And in response to appellant's counsel's question of whether he was overruling the motion and request "to hold as a matter of law that those statements were involuntary", replied "That is right."

four St. Louis, Missouri, policemen and two State Highway Patrolmen are in direct conflict with the testimony of the accused in regard to the confession. Further, testimony of the accused regarding his non-participation in the killing of Donnell is rather persuasively refuted by prison guard Dietzel and inmates Creighton and Trout, all of whose statements are consistent with the State's version of the group assault and killing of inmate Donnell.

In other words for Stidham to be innocent as claimed all of the other testimony in the case, except as to formal matters and some neutral medical testimony from the Springfield Medical Center, would have to be out and out perjury. As noted by the Missouri Supreme Court in Stidham's original appeal, *State* v. *Stidham*, 365 S.W.2d 7 (1957), the accused Stidham while taking the stand failed to controvert essential elements of the State's case and failed to adduce any corroboration for his version of the facts.[3]

The trial lasted several days and the jury after being out 1½ hours rendered a unanimous verdict of guilty. Certainly no material error affecting the integrity of the fact-finding process has been disclosed.

---

3. A reading of the record of the original trial shows the rioters made a particular effort to break through three doors to get into Death Row where Stidham was being held in solitary confinement (for infraction of prison rules—escape) for the particular purpose of releasing Stidham and then presenting him to the group as their leader. Stidham's version that he left the Death Row area immediately and went upstairs to another cell and listened on the radio while drinking coffee during all of the period of the tumultuous riot does not appear credible. Also no corroboration has been produced by Stidham either at the time of trial or since. While on the other hand three witnesses, guard Dietzel and inmates Creighton and Trout, directly controverted Stidham's version of his actions at that time and place Stidham at the scene of the crime with the other six defendants who were accused of this brutal and sadistic killing. Without detailing all of the evidence, the evidence presented aside from the confession was persuasive.

I would affirm Judge Collinson and his view that the action of the original trial judge "clearly indicates a finding of voluntariness and is sufficient under the teachings of *Jackson* v. *Denno, supra,* and *Sims* v. *Georgia, supra.*" Furthermore issues of credibility and issues of fact decided long ago should not be upset by technicalities or semantics. There appears to be no constitutional defect in the fact-finding process utilized in this case and the issue of credibility after full hearing was decided adversely to Stidham both in the original trial and at a plenary State post-conviction hearing, *affirmed* in 449 S.W.2d 684 (Mo. 1970). I would affirm the District Court's denial of relief.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1970

James William Stidham,
Appellant,
vs.
Harold R. Swenson,
Appellee.
No. 20685

Appeal from the United States District Court for the Western District of Missouri.

This appeal comes before the Court on consideration of appellee's petition for rehearing or transfer to the Court en banc. Being fully advised in the premises, it is now here ordered:

1. Petition for rehearing en banc is denied by an equally divided Court;

2. Petition for rehearing by the panel to which the case was previously submitted is denied.

June 11, 1971

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES WILLIAM STIDHAM,
Petitioner,
vs.
HAROLD R. SWENSON,
Respondent.

Civil Action
No. 18711-2

Order Granting Leave to Proceed in Forma Pauperis and Denying Petition for Habeas Corpus

(Filed November 5, 1970)

On February 18, 1970, Stidham filed a petition for habeas corpus which was denied by this Court by order entered on May 15, 1970. *Stidham* v. *Swenson*, Civil Action No. 18121-2. Stidham filed a notice of appeal and a request for certificate of probable cause which was granted, along with leave to appeal in forma pauperis. On June 25, 1970, the Eighth Circuit Court of Appeals granted Stidham's motion to dismiss the appeal. At that time the Clerk of the Court informed Stidham that if he intended to renew his claims, he had to proceed anew in the district court.

On September 25, Stidham filed another petition for habeas corpus in this Court in which he by reference to his prior petition stated identical grounds for relief. Shortly before or at the same time he filed a motion to reinstate the appeal in the Court of Appeals, despite the instructions given to him when his appeal was dismissed. The Court of Appeals denied his motion.

The pertinent facts are set out in the order denying the petition for habeas corpus in Civil Action No. 18121-2

and need not be restated here. In that petition, Stidham stated seven grounds for relief, which were: (1) that he was tried and convicted upon a charge of conspiracy which was not included in the indictment; (2) that he was deprived of assistance of counsel at two critical stages of the proceedings against him; (3) that he did not knowingly or competently waive the assistance of counsel at any stage of the proceedings; (4) that certain members of the Missouri State Highway Patrol and personnel of the Missouri State Penitentiary exerted physical and mental punishment upon him to secure a confession from him; (5) that the trial judge admitted the confession into evidence without first making a clear and specific finding that the said confession was voluntary; (6) that Instruction No. 6 given at the trial did not fully set out the constitutional standards for the jury's guidance to determine the voluntariness of the said confession; and (7) that the state knowingly used perjured testimony of two convicts to obtain the conviction of petitioner.

By amendment to this petition herein, Stidham states an additional ground for relief, alleging that he was denied the right to confront and cross-examine a state's witness whose testimony as to certain implicating statements was objected to, the objection sustained, but the jury not instructed to disregard.

In regard to Stidham's seven allegations which are raised here for the second time and upon which this Court denied relief in the prior petition (18121-2), it is unnecessary to restate our findings, and we readopt them here. However, one point—that he was denied counsel at arraignment and preliminary hearing—does merit further consideration.

Factually, there were two arraignments. The first was instituted by the prosecuting attorney on an informa-

tion in the magistrate court. Although Stidham demanded counsel at that time, none was appointed. A plea of not guilty was entered for him. (V.A.M.S., § 546.020) Preliminary hearings were held as required by V.A.M.S., § 544.250. The information was later dismissed, and Stidham was arraigned again on an indictment returned by the Grand Jury of Cole County. At that time counsel (whom he had requested) was appointed for him. In the prior civil action (18121-2), we held that Stidham was not entitled to relief because the arraignment and preliminary hearing have been held not to be critical stages in Missouri. *State* v. *Benson,* (Mo. Sup.) 415 S.W. 2d 773; *State* v. *Patrick,* (Mo. Sup.) 420 S.W. 2d 258; *Madison* v. *Tahash,* (C.A. 8) 359 F. 2d 60; *Donnell* v. *Swenson,* (W.D. Mo.) 302 F. Supp. 1024; *Pope* v. *Swenson,* (C.A. 8) 395 F. 2d 320; *Nolan* v. *Nash,* (C.A. 8) 316 F. 2d 777.

Subsequent to our opinion in the prior habeas corpus action, the Supreme Court handed down *Coleman* v. *Alabama,* 399 U.S. 1, in which it was held that a preliminary hearing is a critical stage of a criminal proceeding, that counsel was essential to protect the accused against any erroneous or improper prosecution, and that the right of counsel under the Sixth Amendment is applicable to such proceedings.

Coleman was decided on June 22, 1970. The arraignment and preliminary hearing in question here occurred in 1955. Assuming, but not deciding, that *Coleman* would apply to the fact situation here, it must be determined whether or not *Coleman* is to be applied retroactively. Although the Supreme Court has not rendered a decision on this point, the Eighth Circuit Court of Appeals has expressly held that *Coleman* is not retroactive. *Konvalin* v. *Sigler,* (C.A. 8) No. 19731 (decided September 22, 1970, not yet reported). Therefore, in line with our controlling

court, we hold that *Coleman* does not apply retroactively to this situation.

Stidham's latest contentions are that he was denied the right to confront and cross-examine one Officer Eitzman who "testified before the jury and judge that he took statements implicating petitioner in the murder he was on trial for;" and that the testimony of Eitzman in regard to these implicating statements was objected to, the objection sustained, but the jury was not instructed to disregard it.

Stidham claims that he exhausted his state remedies in regard to these contentions because the Missouri Supreme Court decided them adversely to him on his direct appeal. *State* v. *Stidham,* 305 S.W. 2d 7. However, a review of that case shows that Stidham did not raise the issue that he was denied the right to confront and cross-examine Officer Eitzman in regard to alleged implicating statements. Nor was the issue raised in any of Stidham's appeals to the Missouri Supreme Court from denials of his 27.26 motions. See *State* v. *Stidham,* (Mo. Sup.) 403 S.W. 2d 616; 415 S.W. 2d 297; 449 S.W. 2d 634. Since Stidham does have presently-existing and adequate state remedies to raise this contention, the contention must be dismissed without prejudice. See 28 U.S.C. § 2254; *Fay* v. *Noia,* 372 U.S. 391.

In his direct appeal from his conviction, Stidham did allege that the trial court should have instructed the jury to disregard the testimony of Eitzman in regard to implicating statements, after sustaining an objection to it. The Missouri Supreme Court found the issue in favor of the state.

The objected-to testimony of Eitzman was as follows: "I had talked to him and explained to him that I had a statement—" (Tr. 508). The trial court sustained the ob-

jection to what Eitzman told Stidham; ruled that the witness was not to testify or be asked what statements he made, or what statements he had from other parties; and determined that the jury did not need to be instructed to disregard because nothing damaging had been said when the defense halted the testimony by its objection. (Tr. 508-511)

There does not appear to be a denial of a federally-protected right by the trial court's determination not to instruct the jury to disregard Eitzman's incomplete remark. Therefore, no relief can be granted by this Court.

For the foregoing reasons, it is

ORDERED that leave to proceed in forma pauperis be, and it is hereby, granted; and

ORDERED that the petition for habeas corpus be, and it hereby is, denied.

/s/ Wm R. Collinson
District Judge

APPENDIX H

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1969

James William Stidham,
Appellant,
vs.
Harold R. Swenson, Warden, Missouri State Penitentiary.
No. 20337

Appeal from the United States District Court for the Western District of Missouri.

Motion of appellant to dismiss the appeal from the United States District Court for the Western District of Missouri in this cause having been filed, and in pursuance of said motion,

It is now here ordered and adjudged by this Court that the appeal from the said District Court in this cause be, and the same is hereby, dismissed without prejudice.

And it is further ordered that the mandate in this cause issue forthwith to the said District Court.

June 24, 1970

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1969

James William Stidham,
Appellant,
vs.
Harold R. Swenson, Warden, Missouri State Penitentiary.

No. 20337

Appeal from the United States District Court for the Western District of Missouri.

Judgment of this Court dismissing the appeal in this cause from the United States District Court for the Western District of Missouri was entered June 24, 1970. Our mandate issued to the aforesaid District Court on that date. The case now comes before the Court on consideration of appellant's motion to reinstate the appeal on our docket. Being fully advised in the premises, it is now here ordered that the motion be, and it is hereby, denied.

October 14, 1970

FILE COPY

Supreme Court, U. S.
FILED
MAR 21 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-224

HAROLD R. SWENSON, Warden, Missouri State Penitentiary,
Petitioner,

vs.

JAMES WILLIAM STIDHAM,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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The Eighth Circuit, hearing a case in habeas corpus, incorrectly interpreted Missouri law when it held that the procedure used at state trial in Missouri in 1955 for testing the competency of a confession, and its subsequent submission to the jury did not meet the minimal standards of *Jackson* v. *Denno* 35

The Eighth Circuit, hearing a case in habeas corpus, incorrectly applied *Simms* v. *Georgia,* 385 U.S. 538, by holding that the finding by the Circuit Court of Butler County, Missouri, in a state criminal trial in 1955, that a confession was not involuntary as a matter of law did not comply with *Jackson* v. *Denno,* 378 U.S. 268 47

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-224

HAROLD R. SWENSON, Warden, Missouri State Penitentiary,
Petitioner,

vs.

JAMES WILLIAM STIDHAM,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

Comes now the petitioner, Harold R. Swenson, Warden, Missouri State Penitentiary for Men at Jefferson City, Missouri, and seeks Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and would state and allege in the following particulars, to-wit:

OPINIONS BELOW

The Opinions of the Supreme Court of Missouri are cited as *State* v. *Stidham* (Mo. Sup. 1957) 305 S.W.2d 7; *State* v. *Stidham* (Mo. Sup. 1967) 415 S.W.2d 297; and *State* v. *Stidham* (Mo. Sup. 1970) 449 S.W.2d 634, and appear as Appendixes D, E and F. That the opinion of the

United States District Court for the Western District of Missouri is cited as *Stidham* v. *Swenson* (W.D. Mo. 1970) 328 F.Supp. 1291, and appears as Appendix G. That the opinion of the United States Court of Appeals for the Eighth Circuit is cited as *Stidham* v. *Swenson* (8th Cir. 1971) 443 F.2d 1327, and appears as Appendix K. A Motion for Rehearing or Transfer to the Eighth Circuit En Banc was denied by an equally divided court on June 11, 1971 and appears as Appendix L.

JURISDICTIONAL STATEMENT

Respondent filed a Petition for Writ of Habeas Corpus pursuant to Title 28, Section 2254, U.S.C.A., in the United States District Court for the Western District of Missouri, Western Division. That from the denial of the granting of the writ by that court, the respondent appealed to the United States Court of Appeals for the Eighth Circuit, which court without oral argument, or appointment of counsel for Stidham, by its opinion filed on May 24, 1971, remanded the cause to the District Court for further proceedings consistent with the remedy provided for in *Sigler* v. *Parker*, 396 U.S. 482 (1970). [See also, *Stidham* v. *Swenson* (W.D. Mo. 1970) 328 F.Supp. 1288]

Jurisdiction is conferred upon this Court by the provisions of Section 1254, Title 28, U.S.C.A., in that this petition was sought within ninety (90) days from the filing of the opinion below and is, therefore, timely under the provisions of Section 2101, Title 28, U.S.C.A.

QUESTIONS PRESENTED

Did the Eighth Circuit Court, hearing a case in habeas corpus, correctly interpret Missouri procedure when it held that the Missouri procedure as to the introduction of confessions in evidence before a jury in a 1955 trial did not comply with *Jackson* v. *Denno*, 378 U.S. 368?

Did the Eighth Circuit Court of Appeals, hearing a case in habeas corpus, correctly apply *Simms* v. *Georgia*, 385 U.S. 538, by holding that a finding by which a confession was found to be ". . . [N]ot involuntary as a matter of law . . ." did not comply with *Jackson* v. *Denno*, 378 U.S. 368?

Did the Eighth Circuit Court of Appeals abuse its discretion by allowing a second appeal, on identical issues, from the denial of a petition for habeas corpus, after the petitioner had once voluntarily dismissed his appeal?

STATUTORY PROVISIONS INVOLVED

Title 28, U.S.C.A., Section 1291, provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court . . ."

Title 28, U.S.C.A., Section 2253, provides:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> "There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of

process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

Title 28, U.S.C.A., Section 2254, provides:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written

indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the state court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual deter-

mination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia, showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

Missouri Supreme Court Rule 27.26, V.A.M.R., provides:

"A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. The following procedure shall be applicable to motions filed pursuant to this Rule:

(a) *Nature of Remedy.* This Rule is intended to provide the exclusive procedure which shall be followed when a prisoner in custody seeks relief on the basis of any of the attacks on a sentence enumerated above. The motion seeking such relief shall be filed in the court where the sentence was imposed. This Rule does not suspend the rights available by habeas corpus but rather prescribes the procedure to be followed in seeking the enforcement of those rights. It includes all relief heretofore available in any court by habeas corpus when used for the purpose of seeking to vacate, set aside or correct a sentence, plus relief not available by habeas corpus. A motion filed hereunder is an independent civil action which should be separately docketed. The procedure before the trial court and on appeal is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required.

(b) *When Remedy May Be Invoked.*

(1) The provisions of this Rule may be invoked only by one in custody claiming the right to have a sentence vacated, set aside or corrected.

(2) A motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected.

(3) A proceeding under this Rule ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal.

(c) *Form and Sufficiency of Motion.* A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto. The motion shall include every ground known to the prisoner for vacating, setting aside or correcting his conviction and sentence. The prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him.

(d) *Successive Motions.* The sentencing court shall not entertain a second or successive motion for relief on behalf of the prisoner where the ground presented in the subsequent application was raised and determined adversely to the applicant on the prior application or where the ground presented is new but could have been raised in the prior motion pursuant to the provisions of subsection (c) of this Rule. The burden shall be on the prisoner to establish that any new ground raised in a second motion could not have been raised by him in the prior motion.

(e) *Hearing.* As soon as a motion hereunder is received by the circuit clerk, he shall notify the prosecuting attorney and transmit a copy thereof to him. If appointment of counsel is required under (h) of this Rule, such counsel shall be appointed immediately and a copy of the motion transmitted to him. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing shall be held. 'Prompt' means as soon as reasonably possible considering other urgent business of the court. This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue shall be determined in the evidentiary hearing. All proceedings on the motion shall be recorded by the official court reporter.

(f) *Burden of Proof.* The prisoner has the burden of establishing his grounds for relief by a preponderance of the evidence.

(g) *Presence of Prisoner.* The prisoner shall be produced at any evidentiary hearing on a motion attacking a sentence where there are substantial issues of fact.

(h) *Right to Counsel.* If a motion presents questions of law or issues of fact, the court shall appoint counsel immediately to assist the prisoner if he is an indigent person. Counsel shall be given a reasonable time to confer with the prisoner and to amend the motion filed hereunder if desired. Counsel shall have the duty to ascertain from the prisoner whether he has included all grounds known to the prisoner as a basis for attacking the judgment and sentence and to amend the motion to include any claims not al-

ready included. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

(i) *Judgment.* The court shall make findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(j) *Appeal.* An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the prisoner or by the State. An appeal may be taken from the order entered on the Motion as in a civil case as authorized by § 512.020, RSMo 1959, V.A.M.S. Appellate review shall be limited to a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous.

(k) *Costs.* If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal *in forma pauperis* and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court a transcript of the evidence on that issue only so as to permit review of that issue by the appellate court.

(l) *Counsel on Appeal.* If a prisoner desires to appeal and contends he is without means to employ counsel to perfect the appeal, the trial court, if satisfied that the prisoner is an indigent person, shall appoint competent counsel to conduct such appeal. Such counsel, may, in the discretion of the court, be the same counsel who represented the prisoner in the trial court on said motion. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

STATEMENT

Respondent is presently confined at the Missouri State Penitentiary at Jefferson City, Missouri, serving a life sentence for First Degree Murder. The procedural history of this case is as follows: On November 23, 1954, an indictment was returned by the Grand Jury and filed in the Circuit Court of Cole County, Missouri, charging defendant and six other penitentiary inmates with the First Degree murder of Walter Lee Donnell, another inmate at that institution, on or about September 22, 1954, during a riot at the Missouri State Penitentiary (App. A, Tr. 5, Cause No. 45537). On that same date, all of those accused including defendant were arraigned before the Court and counsel was appointed to represent each of them individually. On December 6, 1954, all of the accused entered pleas of not guilty (App. A, Tr. 5, Cause No. 45537).

On December 14, 1954, defendant filed a Motion for Production and Inspection, a Motion to Dismiss, a Motion for a Severance, a Motion for a Polygraph Examination and a Motion to Suppress (App. A, Tr. 5, Cause No. 45537). On December 20, 1954, the Court sustained the Motion for a Severance (App. A, Tr. 18, Cause No. 45537), and denied the Motion to Dismiss (App. A, Tr. 19, Cause No. 45537) and the Motion to Suppress (App. A, Tr. 20, Cause No.

45537). On December 23, 1954, the Court denied the Motion for a Polygraph Examination and on January 3, 1955, the State confessed the Motion for Production and Inspection (App. A, Tr. 22, 24, Cause No. 45537). On February 15, 1955, defendant filed an application for change of venue and an affidavit in support thereof based upon the alleged bias and prejudice of Cole County citizens against him, and also filed an affidavit for disqualification of Judge Sam C. Blair based on alleged interest and prejudice (App. A, Tr. 27-44, Cause No. 45537). On February 16, 1955, Judge Blair sustained the application for his disqualification and so notified the Supreme Court of Missouri (App. A, Tr. 45, Cause No. 45537). On February 22, 1955, on order of the Supreme Court of Missouri, Judge George P. Adams was transferred to hear appellant's case and on February 25, 1955, Judge Adams sustained defendant's application for change of venue and transferred this cause to the Circuit Court of Butler County, Missouri (App. A, Tr. 45-49, Cause No. 45537).

On April 25, 1955, defendant waived formal arraignment, pleaded not guilty and the cause proceeded to trial before a jury. Upon learning that the jury had read a newspaper account of the trial, the Court granted defendant's request for a mistrial and the cause was reset for July 18, 1955 (App. A, Tr. 55-64, Cause No. 45537). On July 18, 1955, the trial commenced and continued until July 20, 1955, when the jury returned a verdict finding defendant guilty of murder in the first degree and assessing his punishment at life imprisonment (App. A, Tr. 757-760, Cause No. 45537).

The cause was appealed on the Transcript and the conviction was affirmed by the Supreme Court of Missouri on September 9, 1957, *State* v. *Stidham*, (Mo. Sup.) 305 S.W.2d 7. On March 9, 1958, pursuant to Missouri Supreme Court Rule 27.26, V.A.M.R., the respondent filed *pro se* in

the Circuit Court of Butler County, Missouri, a Motion to Vacate and set aside his sentence. The Motion to Vacate was denied without an evidentiary hearing and on appeal the Supreme Court of Missouri affirmed the order and judgment. *State* v. *Stidham,* (Mo. Sup.) 403 S.W.2d 616.

Thereafter, respondent filed a *pro se* Motion to Vacate and Set Aside his sentence pursuant to Supreme Court Rule 27.26, V.A.M.R., which presented claims allegedly not presented in the first motion. The trial court without an evidentiary hearing also denied the second motion to vacate and on appeal, the Supreme Court of Missouri reversed the order and judgment and remanded the cause for further proceedings in compliance with the amended provisions of Rule 27.26. *State* v. *Stidham,* (Mo. Sup.) 415 S.W.2d 297. Appellant filed a change of venue, and filed his motion in the Circuit Court for the City of St. Louis, and an evidentiary hearing was had December 5, 1968.

At the evidentiary hearing the original transcript and a stipulation of facts were offered and received in evidence and appellant and the State introduced other evidence pertaining to the issues made by the pleadings. On April 14, 1969, appellant's motion to set aside judgment and sentence was overruled (App. B, Tr. 130, Cause No. 54674). A consolidated appeal, both reinstated direct appeal and appeal from respondent's 27.26 hearing, was made to the Supreme Court of Missouri and that Court affirmed the decision of the lower court. *State* v. *Stidham,* (Mo. Sup.) 449 S.W.2d 634.

On February 18, 1970, respondent filed a petition for *habeas corpus* in the United States District Court for the Western District of Missouri, Western Division which was denied by that Court by order entered on May 15, 1970. [*Stidham* v. *Swenson,* 328 F.Supp. 1291]. From this denial

respondent filed a Notice of Appeal and a request for Certificate of Probable Cause which was granted. On June 25, 1970, the United States Court of Appeals for the Eighth Circuit granted respondent's Motion to Dismiss his appeal and on October 14, 1970, denied respondent's Motion to Reinstate his appeal on Eighth Circuit docket. On September 25, 1970, appellant filed a second petition for *habeas corpus* in the United States District Court for the Western District of Missouri in which he stated identical grounds as his prior petition, and additionally attacked lack of counsel at preliminary hearing. The United States District Court for the Western District of Missouri denied his petition for writ of *habeas corpus*, and an appeal was taken to the United States Court of Appeals for the Eighth Circuit. That Court, without oral argument, on the 24th day of May, 1971, reversed and remanded to the District Court for further proceedings provided for in *Sigler* v. *Parker*, 396 U.S. 482 (1970), requiring a further evidentiary hearing before the Missouri courts.

The historical factual evidence presented before the Missouri Circuit Court in 1955 was as follows: Sgt. E. V. Nash of the Missouri Highway Patrol was the State's first witness and set the physical scene by identifying Exhibit 1 as a drawing he made showing the physical makeup of B-Unit of the Missouri State Penitentiary on September 22 and 23, 1954 and in describing that building and the contents thereof (App. A, Tr. 57-64, Cause No. 45537), this witness also identified Exhibits 2, 3, and 7 as photographs showing gates, passageways and cells in and around the maximum punishment area of that institution.

Lt. W. S. Barton of the Missouri State Highway Patrol testified that at 10:00 p.m. on September 22, 1954, he arrived at the Missouri State Penitentiary and went to B-Basement, where he found the severely mutilated body of a man in Cell-18 of the maximum punishment area (App.

A, Tr. 91-92, Cause No. 45537). Lt. Barton identified Exhibit 8 as a photograph of a man whose body he found and it was introduced into evidence (App. A, Tr. 93-94, Cause No. 45537). Lt. Barton further identified Exhibit 9, a sixteen pound sledge hammer, as the instrument he found beside the body on the night in question and further identified Exhibit 10 as a photograph of Cell-18 of the maximum punishment area (App., A, Tr. 9598, Cause No. 45537). This witness testified that when he found the sledge hammer it was bloody, and that all three (3) doors leading into the maximum punishment area of the Missouri State Penitentiary were standing open with water on the floor and debris scattered about (App. A, Tr. 108, Cause No. 45537).

Sgt. James Rhodes, a Laboratory Chemist for the Missouri State Highway Patrol, testified that he analzyed stains on Exhibit 9, the sledge hammer, and that they were human blood (App. A, Tr. 128-130, Cause No. 45537).

J. G. Lamar, Superintendent of Records at the Missouri State Penitentiary, testified that he had control and supervision of all records at that institution and that by law those records had to contain a photograph of and fingerprints of all inmates. He identified Exhibit 8 as a photograph of Walter Lee Donnell, an inmate at the Missouri State Penitentiary, and stated that on September 22, 1954, he viewed Donnell's dead body (App. A, Tr. 135-136, Cause No. 45537), and further testified that he viewed that dead body while an autopsy was performed by Dr. Shull (App. A, Tr. 142-144, Cause No. 45537).

James Enyard, an employee of Dulle Funeral Home in Jefferson City, Missouri, testified that on September 24, 1954, he saw the dead body of the person shown in Exhibit 8, the photograph of Donnell, and that he removed the body to the funeral home and embalmed it (App. A, Tr.

152-155, Cause No. 45537). On the back of that body Mr. Enyard noted on the left side and in the rib section four (4) or five (5) wounds and also found five (5) round wounds on the left chest over the heart (App. A, Tr. 155-156, Cause No. 45537). In his opinion the back wounds were made with a knife and front wounds with a round instrument (App. A, Tr. 157, Cause No. 45537).

Dr. G. D. Shull testified that in Nashville, Tennessee, on September 25, 1954, he performed an autopsy on the body of Walter Lee Donnell. This witness described numerous fractures, punctures, and wounds, and said that it was his medical opinion that the skull fracture was a mortal wound (App. A, Tr. 163-168, Cause No. 45537). This witness testified that two (2) of the five (5) chest stab wounds passed clear through the heart, while two (2) of the back wounds had penetrated the heart. The chest wounds were mortal while the latter in all probability would be so considered (App. A, Tr. 169-170, Cause No. 45537). Dr. Shull further testified that it was his opinion that the back wounds were caused by a thin blade, like that of a pocket knife, but did not penetrate as deep as the front wounds, which were caused by an instrument at least four (4) to five (5) inches long (App. A, Tr. 171-172, Cause No. 45537). This witness testified that there were no gunshot wounds in the body (App. A, Tr. 172, Cause No. 45537). The doctor testified that he thought the blunt end of Exhibit 9, the sledge hammer, could have caused the injury to the skull of Donnell (App. A, Tr. 174, Cause No. 45537).

Clarence Dietzel, a member of the guard force at the Missouri State Penitentiary was on duty at the Missouri State Penitentiary on the night of the riot, and testified that he was on duty in B-Unit and that on that night there were nine (9) inmates in the maximum punishment area, including defendant Stidham (App. A, Tr. 187-188, Cause

No. 45537). A disturbance started in the prison around 6:30 p.m. that night and a group of rioters thereafter tried to break into B-Hall (App. A, Tr. 189, Cause No. 45537). In that group this witness recognized Donald DeLapp, Paul Kenton, Jackie Lee Noble, William Hoover, and Joseph M. Vidauri, and he further heard DeLapp yell to Stidham and tell Stidham that they were coming to get him out and also heard Stidham yell back for them to hurry (App. A, Tr. 190-192, Cause No. 45537). Mr. Dietzel testified that the group outside of B-Unit were using a sledge hammer similar to Exhibit 9 (App. A, Tr. 203, Cause No. 45537), and an iron bar beating on the doors attempting to gain entrance to B-Unit. DeLapp demanded witness Dietzel's keys, which demand was refused (App. A, Tr. 198-199, Cause No. 45537), but eventually the group of inmates broke in Gate No. 2 where the witness was and then they searched him and again demanded the keys to Gate No. 3, which demand was also refused (App. A, Tr. 204-205, Cause No. 45537). The group thereafter got through Gate No. 3 and into Death Row, and Noble and others in the group locked witness Dietzel in a cell in the maximum punishment area for approximately twenty (20) or twenty-five (25) minutes and then took him out of that area and thereafter he did not witness any of the events of the killing (App. A, Tr. 207-210, Cause No. 45537).

The State then called James Creighton, an inmate, and defendant objected to his testimony, the basis being that the witness was claimed to be of unsound mind and defendant requested a hearing to determine his competency which was granted (App. A, Tr. 241, Cause No. 45537). At this inquiry, held outside of the hearing of the jury, Mrs. Alma Miller, a medical records clerk at State Hospital No. 1, in Fulton, Missouri, testified that she was the custodian of the records of the patients in that hospital (App. A, Tr. 242, Cause No. 45537). In conference it developed that

only three (3) pages of the record, marked for identification as Exhibits C, C-1, and D were involved (App. A, Tr. 246-249, Cause No. 45537), and the witness stated that she did not know who prepared those pages, did not see them prepared, did not know when they were prepared, except that an inmate of the Fulton Hospital typed them, and could not say that they were correct (App. A, Tr. 250-252, 256-258, Cause No. 45537). For the purposes of the *voir dire* hearing only the Court admitted Exhibits C, C-1, D, 14 and 15 into evidence and they were incorporated into the Transcript (App. A, Tr. 260-267, Cause No. 45537).

Still outside the hearing of the jury, James Creighton took the witness stand and testified in detail concerning his status as an inmate of the Missouri State Penitentiary, his convictions and the legal proceedings thereon, and his being in a cell in the maximum punishment area on the night in question (App. A, Tr. 267-270, Cause No. 45537). He admitted being in Fulton State Hospital No. 1, Fulton, Missouri, for thirty-five (35) days, admitted a cutting while in the Penitentiary, admitted that he had feigned an attempted suicide to get out of solitary at the prison and transferred to Fulton, but denied being in any other mental institution, denied being taken before a Probate Court and being committed as an insane person (App. A, Tr. 270-273, Cause No. 45537). At the close of this hearing, defendant's request to have witness Creighton declared incompetent was refused.

Before the jury, witness Creighton testified that he was serving a life sentence in the Missouri State Penitentiary and on the night of September 22, 1954, was in Cell 17 in the maximum punishment area, next to Walter Lee Donnell in Cell 18 (App. A, Tr. 278-279, Cause No. 45537). Creighton testified that in June, 1954, Stidham began celling in the maximum punishment area and from then un-

til the night of the riot Stidham cursed, ridiculed and threatened Donnell over and over and told Donnell that he would kill him if he could get at him (App. A, Tr. 280-285, Cause No. 45537). On the night of the riot DeLapp and defendant Stidham hollered back and forth to each other, DeLapp saying that he was going to get Stidham out of his cell and Stidham begging DeLapp to hurry, during which time Stidham was continuing to threaten to kill the witness and Donnell (App. A, Tr. 288-290, Cause No. 45537). Stidham told Donnell that Donnell was to be killed because he had testified against "Thompson and them in St. Louis before the grand jury" (App. A, Tr. 291, Cause No. 45537). Later Stidham got out of his cell and together with Hoover, DeLapp, Kenton, Noble, Laster and Vidauri tried to get into the witness's cell, after clearing the other inmates out of the maximum punishment area (App. A, Tr. 292-293). This group had a key for the lock to witness's cell and were using a pole and a sledge hammer like Exhibit 9 to keep witness back from the front door of the cell. During all of this the witness received a broken jaw but by jamming the lock to the cell with concrete, a comb and "junk" he kept them from getting in (App. A, Tr. 294-296, Cause No. 45537). He heard Stidham tell Donnell they would get him next (App. A, Tr. 297, Cause No. 45537) and then the group moved to Donnell's cell where the sledge was again used (App. A, Tr. 295, Cause No. 45537).

From his cell witness could not see a person enter Donnell's cell but he could see a man go right up to the cell, all seven (7) of the men, including Stidham, headed for Donnell's cell and went out of witness's sight, whereupon witness heard Donnell begging, hollering and pleading for his life, witness then heard a gurgling sound and saw the seven (7) men run out of the cell but thereafter

he did not see any of them during that night (App. A, Tr. 297-299, Cause No. 45537).

Herman Trout, an inmate of the Missouri State Penitentiary and a plumber of that institution, testified that on the night in question he went into his shop in B-Unit after the riot started (App. A, Tr. 335-337, Cause No. 45537) and hid his tools from the rioters and watched while DeLapp, Hoover and Kenton tried to force open a door and heard DeLapp talk with defendant Stidham about getting Stidham out of his cell (App. A, Tr. 338-340, Cause No. 45537). At DeLapp's direction a fire was started and later Vidauri and Noble joined them and knives were produced (App. A, Tr. 341-342, Cause No. 45537). Witness Trout testified that the group eventually got the three (3) doors leading into the maximum punishment area open and Stidham and Laster were let out of the cells, whereupon witness saw DeLapp put his arm around Stidham and say "Gentlemen, I have brought you this far, this is your leader from here on." (App. A, Tr. 344-346). Stidham and others then got weapons, took Guard Dietzel out of that area and after getting other inmates cleared out, went down into the cage of cells in the maximum punishment area proper (App. A, Tr. 347-351, Cause No. 45537). Witness Trout heard hollering and yelling, and after the hollering stopped Stidham and the others emerged from death row and washed their hands in a wash basin and discarded some of their clothing (App. A, Tr. 352, Cause No. 45537). From his position witness could see the actions of the seven (7) men until they got into the maximum punishment area proper, and during the time the seven (7) were in there he heard a man screaming and yelling in a shrill voice stating that he was not a snitch (App. A, Tr. 353-354, Cause No. 45537). While the seven (7) were getting into the maximum punishment area and while they were there, including the time that they washed and left

the area, witness was in the dark in a position where the group could not see him (App. A, Tr. 384, 388, Cause No. 45537). Witness testified that he did not see who murdered Walter Lee Donnell (App. A, Tr. 389, Cause No. 45537).

Sgt. Percy Little, a State Highway Patrolman, testified that on September 27, 1954, he and another Patrolman and four (4) City of St. Louis policemen questioned Stidham in the Athletic Building of the State Penitentiary, and Stidham wrote out a statement, identified as Exhibits 16 and 16-1, and then signed it (App. A, Tr. 394-396, Cause No. 45537). At this stage the Court granted Stidham's counsel's request for a preliminary hearing inquiring into the voluntariness of the oral and written statements made by defendant (App. A, Tr. 398, Cause No. 45537).

At this voluntariness hearing, which covers pages 400-485 of the Transcript, Appendix A, Cause No. 45537, the State presented the testimony of all the police officers and patrolmen who were present at the time of the questioning of Stidham and who heard his oral confession and saw him sign Exhibit 16 and Exhibit 16-1. Each testified that no physical force or threats were used against Stidham and that Stidham voluntarily and of his own free will signed the confession admitting that he and others went into Donnell's cell and cut and beat Donnell and that he himself had used a kitchen knife six (6) to seven (7) inches in length to slash Donnell's face and neck. Each of the officers identified his signature on Exhibit 16-1 and his initials on Exhibit 16, the latter being the first page of the written statement and the former the second page thereof. None of the officers saw a rope in the questioning room and none saw anyone abuse Stidham in any way.

Stidham himself testified on this voluntariness hearing and said that on being questioned in the Athletic shed on September 27, 1954 he had first denied any knowledge of the death of Donnell (App. A, Tr. 474, Cause No. 45537). At this time Stidham said that he was held on a stool by handcuffs, had a belt attached to the legs, a coat was placed on him and his hands were cuffed behind him (App. A, Tr. 452, Cause No. 45537). When Stidham told his interrogators that he would be willing to submit to a lie detector test, Lt. Eitzman told him that he would be given that test immediately, and he was thereupon raised off the floor by a rope attached to the handcuffs on his wrists. The first chaining up lasted fifteen (15) minutes, according to Stidham's testimony, and he still refused to sign a statement, so he was raised up again and left hanging for thirty-five (35) more minutes, during which time he lost consciousness twice and was beaten. Stidham testified that he suffered an injury to his left arm rendering the hand thereof paralyzed in places (App. A, Tr. 453-455, Cause No. 45537), and defendant further testified that because of the torture and pain he agreed to write out Exhibits 16 and 16-1, which he said were dictated to him by Sgt. Little (App. A, Tr. 455, Cause No. 45537). At the close of this testimony the Court made the following ruling:

> "THE COURT: 16 and 16-1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the jury, subject of course to any attacks as to its credibility by the defendant. The defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the jury, that the statement is and should be

admissible in evidence, subject to further examination of witnesses which might be conducted, so we may proceed with Sgt. Little, as to his identification before the jury of the statement in question, Exhibits 16 and 16-1.

"MR. HENNELLY: In other words, the Court is overruling my motion, and request of the Court to hold as a matter of law, that these statements were involuntary, is that right?

"THE COURT: That is right. Mr. Sheriff will you bring the jury back in? (App. A, Tr. 486, Cause No. 45537)."

Six police officers then testified before the jury and each identified Exhibits 16 and 16-1 as Stidham's written statement and testified that it was voluntarily given (App. A, Tr. 486-565, Cause No. 45537). Over Stidham's counsel's objection the exhibits were introduced into evidence and read to the jury (App. A, Tr. 569-571, Cause No. 45537). After reading the confession of Stidham, the State rested its case and the Court denied defendant's motion for judgment of acquittal of Murder in the First Degree and his motion for a reduction of the charge (App. A, Tr. 572-573, Cause No. 45537).

Stidham's first witness was Clyde Bridger, State Registrar of Vital Statistics, who identified Exhibit FF as a photostat of the Official Certificate of Death of Walter Lee Donnell, as amended, and also identified Exhibit G as a photostat of that certificate before its amendment (App. A, Tr. 574-580, Cause No. 45537). Mr. Bridger testified that Exhibit G showed the cause of death as being a bullet wound by gun and that Exhibit FF showed the cause of death as by multiple injuries, stab wounds in heart and lung, brain trauma and crushing injury of skull (App. A, Tr. 581-582, Cause No. 45537), the witness testified that the

amendment was made because of an affidavit furnished by the Cole County Sheriff, the sheriff being the one who signed the original Certificate of Death (App. A, Tr. 582-583, Cause No. 45537).

Stidham then took the stand in his own defense and testified that on the night in question he was in a cell in the maximum punishment area of the Missouri State Penitentiary next to the shower, somewhere West of Creighton's cell, and that at about 6:30 p.m. he heard the riot commence (App. A, Tr. 592-593, Cause No. 45537). Stidham denied threatening Donnell or Creighton at any time but recalled that Creighton had often threatened to kill him and others in the maximum punishment area (App. A, Tr. 593-594, Cause No. 45537). An unknown inmate let him out of his cell and he then went upstairs to B-Hall where he listened to the radio and drank coffee with other inmates (App. A, Tr. 596-597). He denied killing Donnell and denied ever being in the cell of Donnell on the night in question, stating that: "I am a thief, but I am not a murderer" (App. A, Tr. 597, Cause No. 45537). Stidham testified he was questioned repeatedly about the murder by police officers and denied any implication at all times (App. A, Tr. 597-600, Cause No. 45537). Stidham then repeated his version of the giving of his oral and written statement in the Athletic shed at the Missouri State Penitentiary and stated that those statements were given because of the pain he was suffering and his inability to resist the torture applied (App. A, Tr. 600-604, Cause No. 45537). Stidham further denied being with DeLapp, Laster and Hoover at any time on the night in question (App. A, Tr. 621, Cause No. 45537) and further testified that the rope which was used to string him up in the shed was tied through a web partition and then to the ceiling of the shed (App. A, Tr. 624, 626, Cause No. 45537).

Stidham called as his witness M. E. Curtis, the records clerk at the Federal Medical Center at Springfield, Missouri, to testify generally as to his position, and to having been at the Federal Medical Center when Stidham was processed at that institution on the 30th of September, 1954. Mr. Curtis testified that the card which was filled out by Stidham indicated that Stidham gave his age as thirty-four (34) years of age (App. A, Tr. 659, Cause No. 45537), that he had no difficulty taking the fingerprints of the left hand, and that they were taken with ease (App. A, Tr. 659-662, Cause No. 45537), that the record did not indicate any signs of physical abuse, or cuts, other than the fact that the record indicated that there was a ragged cut scar between the middle and little fingers on the palm side of the left hand (App. A, Tr. 659-662, Cause No. 45537). Mr. Curtis indicated the manner in which fingerprints were taken for the purposes of the record at the Federal Medical Center, and again testified that he had no difficulty taking the fingerprints of Mr. Stidham's left hand (App. A, Tr. 662-663, Cause No. 45537).

Stidham called Dr. Thomas A. Hatcock, a Doctor at the U.S. Medical Center at the federal prison at Springfield, Missouri, who testified that on the 30th of September, 1954, he made an examination of defendant Stidham which was limited to subjective complaints (App. A, Tr. 665-666, No. 45537). Dr. Hatcock further testified that petitioner was not put through the usual procedure as one would when becoming an inmate at the Federal Medical Center, but was tested strictly as to his subjective complaints. Dr. Hatcock testified that Stidham complained of an injury to his left hand as a result of being suspended by a rope tied to his hands with his hands at his back. It was Dr. Hatcock's further testimony that Stidham complained of stiffness of the left ring and little fingers and an inability to forcibly flex and extend those fingers. Dr. Hatcock re-

vealed that his tests showed an ability to partially flex and extend those fingers although the function seemed to be weak and the muscles seemed to be weak. The doctor's testimony was that Stidham complained of numbness involved in those fingers, but not of a complete loss of sensation, but a numb feeling involving the little and ring fingers (App. A, Tr. 666-667, No. 45537).

When Stidham's counsel asked the doctor if the doctor had actually found weakness in flexation, the doctor testified that the symptoms were subjective and that they were symptoms that could be present without showing external signs of injury and that the supposed trauma would be based pretty much on a patient's story. On the propounding of a hypothetical question to Dr. Hatcock by Stidham's counsel, the doctor testified that the injury to two fingers of Stidham's left hand could have been caused by Stidham's having been hung from the ceiling as Stidham had previously testified (App. A, Tr. 669-670, No. 45537).

On cross-examination, Dr. Hatcock testified that he saw no bruises on Stidham's left arm, that the information about Stidham's ability to flex his left arm and two fingers of his left hand were from Stidham himself, subjective, and entirely dependent upon subjective findings.

The jury found Stidham guilty of murder in the first degree and his punishment was assessed at confinement in the Missouri State Penitentiary for the rest of his natural life.

At the hearing held pursuant to Missouri Supreme Court Rule 27.26, Stidham testified that when he was convicted of murder he was serving a twenty-five (25) year sentence for robbery and had served two prior Dyer Act sentences (App. C, Tr. 18, Cause No. 54674). Stidham fur-

ther testified that he was in solitary confinement from January, 1953, until immediately before the riot, that he was then moved to death row (App. C, Tr. 19, Cause No. 54674), that he was housed in a five by seven room, with no furniture, an old toilet and basin, with cockroaches and rats (App. C, Tr. 20-21, Cause No. 54674). When moved to death row, Stidham was only given a straw tick to sleep on and while on death row was intermittently beaten by guards (App. C, Tr. 22-24, Cause No. 54674).

Stidham testified that the riot occurred at 6:00 p.m. and that he was released from his cell at approximately 8:00 o'clock by a person he identified as Inmate Ford (App. C, Tr. 24, Cause No. 54674). Stidham's testimony was that on being released from his cell he roamed around B Hall, listened to the radio, drank coffee, and stayed in B Hall drinking coffee and listening to the radio until the riot ended. Additionally, petitioner Stidham denied having anything to do with the killing (App. C, Tr. 25, Cause No. 54-674).

Stidham's testimony was that after the riot he was returned to his original cell in death row (App. C, Tr. 26, Cause No. 54674), that the floor was covered with water, and that officers started immediately questioning him through the bars. Additionally, he testified that he was threatened, that he was called names, and that the questioning occurred approximately twenty-five (25) to twenty-eight (28) times with no physical abuse at that time (App. C, Tr. 27, Cause No. 54674).

Stidham testified that at 3:00 a.m. on September 23, 1954, he was awakened by Lt. Barton and questioned for one and one-half hours (App. C, Tr. 29, Cause No. 54674), and that he was questioned in the athletic shack on the lower yard of the Missouri State Penitentiary on the 27th of September, 1954, by Officers Little, Caldwell, Ren-

derer, Overbeck, Billings, and Eitzman (App. C, Tr. 30, Cause No. 54674). Stidham's testimony was that this questioning took approximately an hour, that all the officers had riot guns and sidearms. At this time Stidham testified that he was placed in a chair, hands cuffed behind his back, a belt placed around his ankles, a heavy coat put on him and asked about the murder (App. C, Tr. 31, Cause No. 54674). When he refused to answer, petitioner testified he was lifted from the floor for about fifteen (15) minutes and was lifted a second time at which time he lost consciouness and his arm was paralyzed. After this treatment, he wrote a statement which was dictated to him by Sgt. Little (App. C, Tr. 32, Cause No. 54674). Stidham testified that he did not have an attorney, but that he tried to bribe guards to call an attorney; that after he wrote the statement he was put in O Hall for three days at which time he had nothing to eat, a bare cell with only slacks to wear (App. C, Tr. 34, Cause No. 54674). Stidham testified that he wanted an attorney because the officers had taken him in front of Creighton who couldn't identify him, and he wanted a lawyer to talk to Creighton before someone got to him. Stidham further testified that on the 29th of September, 1954, his body was a mass of bruises and he had lost twenty-five (25) pounds during the five (5) day period (App. C, Tr. 36, Cause No. 54674).

Stidham further testified that the information by which he was charged with murder was read to a group of co-defendants and him, at which time he attempted to get a lawyer and at that time the judge appointed him an attorney. Stidham testified that from the time of the riot to arraignment, he had not talked to anyone except Father Stevens, the Chaplain of the Missouri State Penitentiary. Stidham further testified that he requested to see Father Clark, a Catholic priest in the city of Jefferson City, Missouri, who requested petitioner's present counsel, Mark M.

Hennelly, to represent Stidham. At the time of arraignment Stidham pled not guilty (App. C, Tr. 37-41, Cause No. 54674).

On cross-examination, Mr. Stidham admitted he had been placed in solitary confinement on the 18th of January, 1953, for attempted escape, and that he had served ten (10) years in jail prior to being in the Missouri State Penitentiary.

Stidham called as an adverse witness Officer Billings of the St. Louis Police Department who testified that he had searched the records of the St. Louis Police Department concerning the prison riot in 1954, and that no records were maintained, and indeed other than expense vouchers no reports had been made. Officer Billings testified that one hundred and two (102) police had been on duty three (3) days, and that twenty-five (25) police had remained on duty for a week at the Missouri State Penitentiary after the riot (App. C, Tr. 47-48, Cause No. 54674).

The state offered William Barton, a Missouri State Highway Patrol Officer at the time of the riot, who testified that he was in charge of investigating the riot, but that he did not recall interrogating Mr. Stidham at the time of the statement. On cross-examination, Mr. Barton testified that he had contacted Inmate Creighton, and Inmate Trout, the two inmate witnesses presented by the state at the original trial. In an attempt to impeach Mr. Barton's testimony, Stidham's counsel read from the original trial transcript where Mr. Barton testified that he had in fact questioned Stidham (App. C, Tr. 56, Cause No. 54674).

The state offered the further testimony of Officer Little, a member of the Highway Patrol in 1954 at the time of the riot. Mr. Little testified that he was involved in the investigation of the murder and arson during the riot (App. C, Tr. 59, Cause No. 54674). Little identified the statement

of Stidham, testifying that he saw Stidham sign the statement but couldn't recall whether he was in the room the entire period of time (App. C, Tr. 60, Cause No. 54674).

Officer Little testified that Stidham was not abused, that he had no complaints of being hungry or tired, that Stidham made no complaint about the lack of food or water, that his physical appearance looked normal to him and that Stidham was not told what to write, that the statement was Stidham's and that Stidham was not threatened (App. C, Tr. 61-62, Cause No. 54674).

Officer Little testified that he did not recall Stidham being handcuffed in the room, but did remember that he was wearing a sidearm at the time of the interrogation. Officer Little testified that the conditions in the penitentiary on the day of the confession were unsettled in that the entire penitentiary was not secure at the time and thus the reason uniformed officers were armed. This witness recalled talking to Creighton and Trout before talking to Stidham (App. C, Tr. 63-64, Cause No. 54674).

When questioned as to whether Stidham had been promised anything in return for a statement, Little answered in the negative, and additionally responded that petitioner had not been struck on the legs with "ballbats, nor hung from the ceiling" (App. C, Tr. 66-67, Cause No. 54674).

On cross-examination, Officer Little testified that he arrived at the penitentiary between 9:30 and 10:00 in the morning, that Stidham's statement was taken in the Athletic Building and that he did not recall talking to Stidham prior to the statement (App. C, Tr. 67-70, Cause No. 54674). The officer testified that he believed he recalled Stidham originally denying guilt, that Stidham was sitting during the interrogation, everything in the statement was written by Stidham, and that he was told the format of the state-

ment but not the facts (App. C, Tr. 70-75, Cause No. 54674). This witness specifically testified that Stidham was not strung up, and specifically testified that Stidham was not told what to write (App. C, Tr. 79-80, Cause No. 54674).

The state offered the further testimony of Tom Jenneman, an officer of the police force of St. Louis, Missouri, who identified Stidham in the courtroom, and identified the statement written by Stidham (App. C, Tr. 81-82, Cause No. 54674). Officer Jenneman testified that he took Stidham to the interrogation from which the statement resulted, that there was a bed in the cell, that he didn't recall water in the cell, that Stidham did not complain about the lack of food nor water to him (App. C, Tr. 83-84, Cause No. 54674). Officer Jenneman testified that no one physically abused Stidham, that no one threatened Stidham, and that no one promised him leniency. The witness testified that he handcuffed Stidham when he was brought down to interrogation, and that the handcuffs were taken off during the interrogation. The witness further testified that Stidham was not hung from the ceiling by the handcuffs, and that Stidham wrote the statement himself (App. C, Tr. 85-86, Cause No. 54674).

On cross-examination, Officer Jenneman testified that Stidham was sitting during the interrogation, that to the best of his recollection the officers all had sidearms, and that Stidham on being brought to the interrogation had been handcuffed behind his back (App. C, Tr. 88-89, Cause No. 54674).

The state offered the further testimony of Elmer Overbeck, an officer of the St. Louis Police Department, who identified the statement given by Stidham, and testified that Stidham wrote it himself. This witness testified that the statement was given after approximately one-half hour of questioning, that Stidham was not physically abused,

was not threatened, was not promised leniency. This witness testified that the statement was written by Stidham, that he didn't believe Stidham was handcuffed during the interrogation, that Stidham was not struck with a "ball-bat", and that Stidham was not hung from the ceiling (App. C, Tr. 93-94, Cause No. 54674).

The state offered the testimony of Charles Billings, an officer of the Police Department of the City of St. Louis, Missouri, who identified the statement given by Stidham, testified that the statement was written by Stidham, and testified that Stidham was questioned in the Athletic shed at the Missouri State Penitentiary (App. C, Tr. 99-101, Cause No. 54674). Officer Billings testified that Stidham's physical condition was normal, that he was not physically abused, that he was not threatened, that he was not promised leniency, and that petitioner wrote the statement himself. On cross-examination, this witness testified that Stidham was questioned in the Athletic shed at the Missouri State Penitentiary, but that the equipment was under lock, and that Stidham had not been hung up and beaten (App. C, Tr. 104-106, Cause No. 54674).

In rebuttal, Stidham offered further testimony that he had been hung up and beaten, and as a result of this beating wrote a statement which was dictated to him (App. C, Tr. 109, Cause No. 54674). Petitioner testified that the statement was incorrect in at least three particulars: (1) the statement put his age at twenty-five (25) when he actually was twenty-eight (28) years old; (2) the statement said he had three convictions under the Dyer Act, when he actually had two (2) convictions under the Dyer Act; and (3) that he was a resident of Kansas City, Missouri, while Stidham testified that he had never been in Kansas City, Missouri.

In his findings of fact and conclusions of law, the state court judge, pursuant to Missouri Supreme Court Rule 27.26, in discussing the voluntariness issue before the trial judge, stated as follows:

> "Movant's contention that the trial court failed to find specifically that the confession was voluntary this Court finds is untenable since the Court found specifically that the confession was not involuntary. Webster's New Collegiate Dictionary, 1961, defines 'involuntary' as 'not voluntary', 'not done, given, etc, willingly by choice, or by act of the will . . .' Under the law of this State the Court followed the correct procedure in determining the issue of voluntariness of the confession and specifically made a finding relative thereto and this Court now so finds that the correct procedure was utilized. . . ." (App. C, Tr. 124, Cause No. 54674).

SUMMARY OF ARGUMENT

The Eighth Circuit conclusion that Missouri procedure at respondent's trial in 1955 was not geared so that the trial court made an initial determination on voluntariness was premised on inadequate consideration of prior Missouri authority.

Missouri procedure, on the determination of voluntariness of a confession, has consistently provided: (1) a hearing outside presence of jury; (2) the hearing is to test the competency of evidence; (3) the trial court is not compelled on presentation of conflicting evidence to submit confession to jury; (4) state carries the burden of nonpersuasion on issue of voluntariness; (5) voluntariness can, and will, be reviewed on appeal, and thus Missouri procedure is fundamentally fair within the Fourteenth Amendment to the United States Constitution.

Finding by Missouri state trial court in 1955, after hearing outside presence of jury, that confession was "not involuntary as matter of law" was a sufficient finding under *Simms* v. *Georgia*.

Three findings appear of record holding the confession voluntary: (1) original determination in 1955; (2) finding by State post-conviction court; (3) finding of Supreme Court of Missouri on appeal.

Jackson v. *Denno* indicates voluntariness finding need not be made at time of trial, thus, the finding on respondent's petition seeking collateral relief, and on appeal to Missouri Supreme Court, both having been post-*Jackson* are adequate findings of voluntariness.

Procunier v. *Atchley* must be extended to hold that petitioner in habeas corpus is not entitled to a new hearing on the coercion aspect of his confession where the only defect pointed to is the form and not the substance of a state court's ruling on competency of evidence for jury consideration.

Constitutional decisions of this court should not be given retroactive application in habeas corpus cases.

The Eighth Circuit was without jurisdiction to consider respondent's successive habeas corpus application in that it had once refused to reinstate respondent's appeal which he had initially dismissed.

ARGUMENT

I.

The Eighth Circuit, hearing a case in habeas corpus, incorrectly interpreted Missouri law when it held that the procedure used at state trial in Missouri in 1955 for testing the competency of a confession, and its subsequent submission to the jury did not meet the minimal standards of Jackson v. Denno.

The decision of the court below incorrectly applies *Jackson* v. *Denno*, 378 U.S. 368 (1964) to Missouri law and demands reversal.

In *Jackson* v. *Denno* this court held that the New York procedure did not fairly determine the issue of voluntariness. Under the New York rule the trial judge had a preliminary hearing regarding the confession and could exclude a confession only if no circumstances existed which would make the confession involuntary. Where facts were disputed, or where reasonable men could differ over the inferences to be drawn from these facts the court in New York *had to* receive the confession and leave to the jury, after proper instructions, both the initial determination of voluntariness and the ultimate determination of truthfulness.

In *Jackson, supra*, this court reserved for determination the question of whether Missouri procedure was an approved method for determining voluntariness. *Jackson* v. *Denno, supra*, at page 380, pages 396-399. There the court held that it was unclear, from the cases then before the court, whether the procedures of fourteen separate states correctly determined voluntariness. The Eighth Circuit Court of Appeals has now incorrectly determined that the Missouri procedure does not meet the *Jackson, supra*, standard.

In *Stidham* v. *Swenson* (8th Cir. 1971) 443 F.2d 1327, the Eighth Circuit remanded to the United States District Court for the Western District of Missouri a habeas corpus proceeding for further proceedings consistent with *Sigler* v. *Parker,* 396 U.S. 482 (1970). After discussing the district court's opinion, the Eighth Circuit states:

> "We believe that the district court's analysis is incorrect. It assumes that Missouri law, at the time of Stidham's trial, required the trial court to find that a confession was voluntary before permitting it to be considered by a jury. Our examination of the Missouri case law convinces us that a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary. . . Our analysis off the record of Stidham's trial leads us to conclude that the trial judge in this case submitted the voluntariness issue to the jury without making a prior factual determination that the confession was voluntary. His finding that the confession was not 'involuntary as a matter of law,' was not, under the then existing Missouri law, the same as finding that it was voluntary." (443 F.2d 1329, 1330).

This was done irrespective of the fact that the Missouri Supreme Court had, in *State* v. *Washington* (Mo. Sup. 1966) 399 S.W.2d 109, held that the pre-*Jackson* cases in Missouri were *indistinguishable in legal effect* from the Massachusetts rule approved. In that case, the court stated:

> ". . . The Missouri practice does not run afoul of the rules laid down in those cases for the determination of the voluntariness of a confession. In Jackson v. Denno, 378 U.S. 368, footnote 7 at page 377, 84 S.Ct. 1774, at page 1781, 12 L.Ed.2d 908, states that: 'Un-

der the New York rule the judge is not required to exclude the jury while he hears evidence as to voluntariness and perhaps is not allowed to do so.' The New York practice was condemned in Jackson v. Denno. It seems the practice of the State of Washington was quite similar to the New York rule. The Missouri practice is indistinguishable in legal effect from the Massachusetts rule as described and impliedly approved in Jackson v. Denno. See also Commonwealth v. Marshall, 338 Mass. 460, 461-462, 155 N.E.2d 798, 800. The Missouri practice contemplates a preliminary or voir dire examination to determine the competency of a confession before it is presented to the jury. This is a full hearing on the voluntariness of a confession out of the presence of the jury and a finding by the court that the confession was voluntary before it is admitted in evidence. State v. Howard, Mo., 383 S.W.2d 701, 702[1]. Thereafter, the witnesses to the circumstances under which the confession was made testify before the jury. The jury then determines the probative value of the confession under the instructions of the court which direct the jury to disregard it entirely if the jury finds the confession was not voluntarily made. State v. Deyo, Mo., 387 S.W.2d 561, 546, 565 [5, 6]; State v. Howard, Mo., 383 S.W.2d 701, 702 [1]." (*Id.* at 114).

A study of representative Missouri cases makes petitioner more reluctant, than was the Eighth Circuit, to conclude that Missouri procedure was improper under *Jackson, supra.* Because of the nature of the reading of Missouri cases by the Eighth Circuit, petitioner is compelled to extensively deal with Missouri case law. That consideration indicates an unbroken one hundred and forty-two year common thread of procedure.

The Missouri procedure had its inception in *Hector (A Slave)* v. *The State* (Mo. Sup. 1829) 2 Mo. 166 where the court states:

> "Whether a confession is sufficiently free and voluntary to be competent testimony is a matter of law to be decided by the court and not by the jury." (2 Mo. 168).[1]

In *State* v. *Patterson* (Mo. Sup. 1881) 73 Mo. 695, the court stated:

> "It belongs alone, as was decided at an early date in this State, to the judicial province to determine as a preliminary question whether a confession was made with that degree of freedom which ought to occasion its admission into evidence. . . ." (73 Mo. 706).

The court further explained its position in *State* v. *Hopkirk* (Mo. Sup. 1884) 84 Mo. 278, by stating:

> "The preliminary question of the admissibility of confessions, is one which belongs alone to the trial courts, and unless it be made plain that error manifest has been committed in this regard, in deciding the question of fact as to whether those confessions were made in circumstances which forbid their being received in evidence and going to the jury, the admission of such confession cannot be held reversible error by this court. . . ." (84 Mo. 283-284).

At the turn of the century, the Missouri Supreme Court reaffirmed this principle in *State* v. *McKenzie* (Mo. Sup. 1898) 45 S.W. 1117, by stating:

> "The learned circuit court pursued the correct and approved practice, in first hearing the circumstances

1. To like effect see: *State* v. *Jones* (Mo. Sup. 1874) 54 Mo. 478; *State* v. *Brown* (Mo. Sup. 1881) 73 Mo. 631.

attending the confession. It was the duty of the court to determine, as a preliminary question, whether the confession was voluntary, before permitting it to go to the jury. . . Having admitted it as evidence, the court correctly ruled that all the circumstances under which it was made should be considered by the jury, under appropriate instructions. . . ." (45 S.W. 1119).

The court made quite clear in *State* v. *Wooley* (Mo. Sup. 1908) 115 S.W. 417, that the question for the judge was that of competency of evidence, when it stated:

"The record discloses that the court proceeded with great care and caution to make the usual preliminary examination as to the admissibility of the confessions made by the defendant. The jury was ordered to retire from the courtroom in charge of the sheriff, and the preliminary examination as to the competency of the confession was carefully considered. Witnesses were introduced as to the circumstances surrounding the defendant at the time he made the statements; what occurred between the defendant and the officers in charge of him at the time; and after hearing such testimony the court ruled that the confession was competent. . . ." (115 S.W. 437).

That the procedure implicitly contemplates a determination of law that the confession is voluntary was made clear in *State* v. *Wilson* (Mo. Sup. 1909) 122 S.W. 671, where it is held:

"The trial court excluded the jury, and made a preliminary examination upon the question of the inducements held out to this defendant to make the confessions, and upon such examination the court ruled that the confessions were voluntary and admissible. . . ." (122 S.W. 675).

In reliance upon the foregoing cases, the court stated in *State* v. *Tharp* (Mo. Sup. 1933) 64 S.W.2d 249:

> "All the witnesses for the state say the defendant was advised he could have counsel and that whatever he said could be used against him. In these circumstances, certainly the trial court did not err in leaving it to the jury to say whether the written confession then made was voluntary or not. While it is the rule that where a confession has been obtained under circumstances rendering it involuntary and inadmissible, a strong presumption exists that any subsequent confession arose from a continuance of the same prior improper influences, and while the presumption must be overcome before the subsequent confession can be received in evidence . . . yet we think the proof here was amply sufficient to make it a jury issue whether the confession in the prosecuting attorney's office was voluntary and independent of any alleged influence exerted on the boys in Trenton the preceding evening." (64 S.W.2d 255-256).

In a case involving a unique trial tactic, *State* v. *Gibilterra* (Mo. Sup. 1938) 116 S.W.2d 88, the court noted that the ordinary procedure of conducting a preliminary hearing outside the presence of the jury had not been used by defense counsel but that counsel had allowed the state's witnesses to testify without objection as to a confession, and did not object to any statements until the confession was itself offered into evidence. Counsel further refused to produce any testimony to substantiate his objection stating that he would do so in open court before the jury. On such facts, the trial court found the confession competent and admitted it for consideration by the jury. In discussing the particular case under consideration, and discussing the general mixed question of

law and fact involved in the preliminary hearing, the court stated:

"Ordinarily, such inquiries are conducted by the court in the absence of the jury. Some decisions hold the court has the right thereat to *determine* (necessarily by weighing the evidence) whether a confession should be submitted to the jury.[1] Others appear to hold that where the evidence is substantial and conflicting, the question should be referred to the jury.[2] A few of these cases say this is true where the state has made a prima facie showing. . . An extensive annotation on the question will be found in 85 A.L.R. 870, 901, where Missouri is classed as a 'doubtful jurisdiction.'

"The rule in this state to be gathered from the cases cited in the margin and others is that if the defendant objects to the admission of the confession on the ground that it was involuntary, and requests a preliminary hearing out of the presence of the jury, the same should be granted. At that hearing if the evidence is conflicting and substantial the court may determine the mixed question of law and fact by weighing the evidence; and if convinced one way or the other should rule accordingly. The state carries the burden of proof at such preliminary hearings.

"It is not the law that if there be any substantial evidence indicating the confession was voluntary the court *must* refer the question to the jury, however much it may be outweighed by evidence to the contrary. If that were true the court would be doing no more than it always does throughout a trial in ruling

2. It should be noted that the conviction in *State* v. *Gibilterra, supra,* was reversed for the failure of the trial court to instruct on the *voluntariness of the appellant's confession.* 116 S.W.2d at 95.

on the admissibility of evidence; and there would be no need of such preliminary hearings except in the rare instances when such evidence is wholly lacking. On the other hand, when there is substantial conflicting evidence and the question is close it is better to refer the underlying issue of voluntariness to the jury than to exclude the confession. . . ." (116 S.W.2d 93, emphasis and footnote the court's).

In reversing a conviction for forcible rape the court again had occasion to consider the proper use, and the function of the hearing held outside the presence of the jury to test voluntariness. In *State* v. *Bradford* (Mo. Sup. 1953) 262 S.W.2d 584, the court stated the issue before the court as follows:

"The decisive issues upon this review involve the questions whether or not defendant's verbal admissions of his guilt, his written confession, and testimony of defendant's statements and conduct during a so-called 're-enactment' tour to the neighborhood of Cousins home were voluntary and consequently admissible as evidence against him, or whether they were, as a matter of law, involuntary and inadmissible, or were inadmissible because obtained in manner violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States." (262 S.W.2d 586).

In discussing the general theory as to submissibility and after restating that the state has the ultimate burden of non-persuasion before the trial court, the court stated:

"Furthermore it is observed that, after a preliminary hearing without the presence of the jury on the issue, a trial court is not obliged to submit the issue of the 'voluntariness' of a confession to a jury merely

because there is substantial evidence tending to show the confession was voluntary however much the evidence of its voluntary character is outweighed by the evidence to the contrary. On the other hand, when there is substantial conflicting evidence and the evidence is close, it is better to refer the issue to the jury than to exclude the confession upon the preliminary hearing. Then the evidence introduced before the jury upon the issue of voluntariness of the confession may also be considered by the trial court (and by the appellate court upon review) together with the evidence introduced at the preliminary hearing, and the confession excluded if it is found, from all the evidence introduced upon the issue, that the confession was involuntary. . . ." (262 S.W.2d 586).

In affirming the conviction of one of respondent Stidham's co-defendants, the Missouri Supreme Court again had occasion to discuss the question of voluntariness. In *State* v. *Laster* (Mo. Sup. 1956) 293 S.W.2d 300, the facts show that when the state indicated that defendant Laster's confession was to be offered the court conducted a hearing outside the presence of the jury on the confession. The state presented evidence, but the defendant presented no evidence at the preliminary hearing. The court as to the voluntariness issue stated:

"Since the defendant chose not to introduce any evidence at the preliminary hearing, and the state made a prima facie case on the voluntary nature of the confession, the court necessarily ruled it admissible. . . In some instances our courts considered also the evidence adduced before the jury in making a final ruling on the admissibility of a confession. . . We rule the confession admissible, however, on the

broader ground that on all the evidence there was no showing sufficiently strong to convince the court conclusively, or as a matter of law, that the confession was involuntary. The question was one for the jury, and an adequate instruction was given on this subject. . . Under our system of jurisprudence it is generally left to the jury to determine whether a confession was voluntary, unless the contrary appears so conclusively that the confession must be held involuntary as a matter of law. . . ." (293 S.W.2d 303-304).[3]

As the Eighth Circuit noted the issue of the voluntariness of respondent Stidham's confession was initially discussed in *State* v. *Stidham* (Mo. Sup. 1957) 305 S.W.2d 7. In that case the court stated:

"There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted into evidence before the state established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, found the issue was for the jury, and later, after hearing the evidence before the jury, submitted the issue to the jury for determination. The testimony was to like effect at each hearing. Two members of the State Highway Patrol and four members of the St. Louis Metropolitan Police Force, present at the time defendant claimed physical violence occurred, testified that no promises had been given, or physical violence, duress, threats or abuse was offered to defendant, categorically denying defendant's testimony. On the conflicting showing the issue of the volun-

3. Compare as to burden of producing evidence: *Lego* v. *Toomey*, ... U.S. ....., 30 L.Ed.2d 618 (1972); and *State* v. *Nolan* (Mo. Sup. 1968) 423 S.W.2d 815.

tariness of the confession was for jury." (305 S.W.2d 10).

In a case, later in time, dealing with this issue of voluntariness, the Supreme Court of Missouri in *State* v. *Bridges* (Mo. Sup. 1961) 349 S.W.2d 214, stated:

> "Prior to the admission of the confessions in evidence, an interlocutory hearing was held out of the presence of the jury. The trial court ruled that the confessions were not, as a matter of law, inadmissible [.] The fact issue was submitted to the jury under an instruction that the confessions should be given such probative value as the jury believed they deserved if the jury found that the confessions were voluntarily given." (349 S.W.2d 217).

From the foregoing cases, petitioner submits that several constants appear:

1. The Missouri procedure contemplates a preliminary, or voir dire hearing outside the presence of the jury.

2. At which hearing, the state has the burden of non persuasion.

3. At the closing of the hearing outside the presence of the jury, the court is presented with two alternatives:

> A. The court *can* find the confession involuntary and withhold it from the jury; or, the court may find the confession *competent evidence* for the jury's consideration and *instruct* as to the jury's duty for finding voluntariness and determining credibility, and weight to be given the testimony.[4]

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4. In Missouri, the court may not take the ultimate voluntariness issue from the jury as this is a fatal comment on the evidence and reversible error. *State* v. *Gibilterra*, 116 S.W.2d at 95. Procedure of non-comment by judge to jury implicitly approved: *Lego* v. *Toomey*, 30 L.Ed.2d at 625.

4. A court may make its determination of involuntariness at three points:

A. After the hearing outside the presence of the jury;

B. After hearing evidence before the jury, and before submission to the jury;

C. By the Supreme Court on appeal.[5]

The question then becomes what does submission of the confession to a jury in Missouri mean. In light of the foregoing cataloging of cases, and the conclusions adduced therefrom, petitioner would submit that the submission of the confession to a jury in Missouri is an implicit statement by the judge that, "I find this *competent evidence*".[6]

To be *competent evidence* in Missouri means that the confession may not be obtained by improper inducements, such as promise of immunity or reward, nor may physical or psychological coercion be inflicted.[7]

Petitioner submits that this Missouri determination for submissibility comports with the fundamental fairness doctrine of the Fourteenth Amendment to the United States Constitution and was not struck down in *Jackson* v. *Denno, supra.*

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5. That this possibility is not a hollow right, see: *State* v. *Bradford,* 262 S.W.2d at 590; compare: *Boulden* v. *Holman,* 394 U.S. 478 (1969).

6. The determination is not unlike that as to the general competency of a witness to testify, i.e., testimony of Creighton (App. A, Tr. 241-275, Cause No. 45537). A similar implicit finding is also made by a judge when he denies a judgment of acquittal thus finding enough evidence to go to the jury.

7. *State* v. *Wooley* (Mo. Sup. 1908) 115 S.W.2d 417; *State* v. *Bradford* (Mo. Sup. 1953) 262 S.W.2d 584; and *State* v. *Glenn* (Mo. Sup. 1968) 429 S.W.2d 225. Compare: *Rogers* v. *Richmond,* 365 U.S. 534 (1961).

Had the Eighth Circuit been correct in its theory, the logical extension of that theory would be that had the judge, after hearing evidence outside the presence of the jury as to voluntariness in Stidham's trial in 1955 said, "I find this confession voluntary as a matter of law", the Eighth Circuit would have been compelled to hold that the trial court had not made a sufficient voluntariness finding pursuant to *Jackson* v. *Denno, supra*. Such reasoning merits reversal.

II.

The Eighth Circuit, hearing a case in habeas corpus, incorrectly applied Simms v. Georgia, 385 U.S. 538, by holding that the finding by the circuit court of Butler County, Missouri, in a state criminal trial in 1955, that a confession was not involuntary as a matter of law did not comply with Jackson v. Denno, 378 U.S. 268.

The Eighth Circuit has incorrectly applied *Simms* v. *Georgia*, 385 U.S. 538 (1967).

In *Jackson* v. *Denno*, this court held that in a criminal case a defendant is deprived of due process if, either in whole or in part, the conviction is based upon an involuntary confession without regard to its truth. Additionally, the court made clear that a further standard was required, and the court couched that standard in the following terms:

> "Equally clear is the defendant's constitutional right at some stage in the proceedings to object to use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." (*Jackson* v. *Denno*, 378 U.S. 376-377).

In *Simms* v. *Georgia,* the court held that the standard as to whether an appellate court could determine whether *Jackson* v. *Denno, supra,* had been complied with was a practical test. That test being, not whether certain talismanic words appeared on the record, but whether the record made by the trial court made clear that it had considered, and ruled upon the defendant's objection that the confession was involuntarily coerced. *Simms* v. *Georgia,* 385 U.S. 544.

The test then is two-pronged:

1. At some point in the proceedings a hearing on voluntariness must be had on defendant's request.

2. The judicial determination that the confession is voluntary must appear on the record.

Such being the test, petitioner would submit that irrespective as to what Missouri law may or may not have been as to voluntariness of confessions at the time of Stidham's trial in 1955, on the historical record presented to this court the Circuit Court of Butler County, Missouri, did make a determination concerning the voluntariness of respondent Stidham's confession and that determination complied with the standards of *Jackson* v. *Denno, supra.*

The record indicates that on the calling of the first state's witness who was to offer testimony as to respondent Stidham's oral statement and written confession, counsel for Stidham requested that a hearing be held outside of the presence of the jury. Such a hearing was had, covering eighty-eight pages of the transcript (App. A, Tr. 398-486, Cause No. 45537). By motion, defense counsel requested:

"MR. HENNELLY: At this point, if Your Honor please, the defendant moves the court to conduct a

preliminary examination and asks the court to inquire into the voluntariness of the statement, and to determine whether the statement was given voluntarily, either the oral or the written statement, and we ask that that hearing be conducted outside the hearing of the jury.

"THE COURT: And the defendant proposes to show by cross-examination, or by its own testimony the involuntariness of the statement?

"MR. HENNELLY: Yes.

"THE COURT: The request will be granted. . . ." (App. A, Tr. 398, Cause No. 45537).

At the end of this preliminary *voir dire* hearing, and after hearing nine witnesses, including all the officers involved in the taking of the confession, and the defendant himself, the court ruled, after the close of defendant Stidham's evidence on the issue:

"MR. HENNELLY: That is all. That is the defendant's motion, Your Honor.

"THE COURT: Now, at the conclusion of the hearing held outside of the hearing of the jury, the request by the defendant for a hearing upon the statement which has been identified as—

"MR. RILEY: 16 and 16-1.

"THE COURT: 16 and 16-1, it is the court's opinion that the matters concerning the statements should be offered in the presence of the jury, subject of course to any attacks as to its credibility by the defendant. The defendant has of course the right to *proceed to challenge the voluntariness of the statement and confession, even before the jury,* but it is the court's opinion that upon the evidence that has been offered

before the court and outside of the hearing of the jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted, so we may proceed with Sgt. Little, as to his identification before the jury of the statement in question, Exhibit 16 and 16-1." (App. A, Tr. 485-486, Cause No. 45537; Emphasis added).

Petitioner would submit that the state trial court has quite clearly, and "with unmistakable clarity" determined the voluntariness of the confession on the record pursuant to the standards in *Jackson* v. *Denno, supra.* Were any doubt to exist that the judge has ruled as a question of law that the confession is not involuntary, that doubt would be erased by reference to the transcript where counsel for Stidham immediately following the judge's ruling set out above, asked the court:

"MR. HENNELLY: In other words, the court is overruling my motion, and requests that the court to hold as a matter of law, that these statements were involuntary, is that right?

"THE COURT: That is right. Mr. Sheriff, will you bring the jury back in?" (App. A, Tr. 486, Cause No. 45537).

As to this point, petitioner would submit that the trial judge, in 1955, did not abrogate his function under Missouri law to initially determine voluntariness and can but conclude that the standards in *Jackson* v. *Denno, supra,* and *Simms* v. *Georgia, supra,* have been met.

On the original appeal of this cause to the Supreme Court of Missouri that court held:

"There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted in evidence before the state established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, found the issue was for the jury, and later, after hearing the evidence before the jury, submitted the issue to the jury for determination." (*State* v. *Stidham* (Mo. Sup. 1957) 305 S.W.2d 10).

Seven years after respondent Stidham's conviction was confirmed on appeal by the Supreme Court of Missouri he filed a motion to vacate judgment and sentence pursuant to Missouri Supreme Court Rule 27.26, V.A.M.R., in the Circuit Court of Butler County, Missouri. That motion to vacate was denied without an evidentiary hearing, and a second motion filed pursuant to Missouri Supreme Court Rule 27.26, *supra,* was also denied without an evidentiary hearing. On appeal of these denials, to the Supreme Court of Missouri, the court reversed and remanded in *State* v. *Stidham* (Mo. Sup. en banc 1967) 415 S.W.2d 297, for an evidentiary hearing with appointed counsel.

After a full evidentiary hearing (App. C., Cause No. 54674) before the Circuit Court for the City of St. Louis, Missouri, petitioner appealed, and pursuant to *Swenson* v. *Bosler,* 386 U.S. 258 (1967), petitioner was given a reinstated direct appeal and consolidated appeal from denial of his motion to vacate sentence and judgment.

The state hearing court, pursuant to Missouri Supreme Court Rule 27.26, *supra,* after a full evidentiary hearing, at which time respondent Stidham presented no new evidence, ruled on the voluntariness issue as follows:

"Movant's contention that the trial court failed to find specifically that the confession was voluntary this court finds is untenable since the court found specifically that the confession was not involuntary. Webster's New Collegiate Dictionary, 1961, defines 'involuntary' as 'not voluntary', 'not done, given, etc. willingly or by choice, or by act of the will . . .' Under the law of this state, the court followed the correct procedure in determining the issue of voluntariness of the confession and specifically made a finding relative thereto and this court now so finds that the correct procedure was utilized. . . ." (App. C, Tr. 124, Cause No. 54674).

On appeal, the Supreme Court of Missouri in *State* v. *Stidham* (Mo. Sup. 1970) 449 S.W.2d 634, approved the findings of fact and conclusions of law of the judge in the 27.26 hearing, and also made its determination that the confession was voluntary:

"And finally, the court found, as had the previous court, that the oral and written confessions were voluntary and, needless to add, the latter finding is overwhelmingly supported in procedure and factually the cause meets all the requirements of the federal cases and there has been no invasion of due process." (*State* v. *Stidham*, 449 S.W.2d 644).[8]

Three voluntariness findings, then, appear of record:

1. The initial voluntariness finding by the state trial court in 1955;

8. It should be noted that the opinion of the Eighth Circuit in this cause fails to indicate that any consideration was given to the finding by the judge pursuant to Missouri Supreme Court Rule 27.26, or the finding by the Supreme Court on appeal.

2. Two post-*Jackson* v. *Denno* determinations;

   (a) The finding by the Missouri state trial court pursuant to Missouri Supreme Court Rule 27.26;

   (b) The finding by the Missouri Supreme Court on appeal.

The question then becomes at what point in the proceeding must a *Jackson* v. *Denno, supra,* determination be made. In *Jackson, supra,* the court merely announced that a defendant had a constitutional right ". . . (a)t some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness. . . ." (378 U.S. 376-377). By reference to the disposition of the case in *Jackson, supra,* it can be seen that this court determined that the proper procedure on remand would be a proper determination by the state court, which did not necessarily include a new trial:

> "It does not follow, however, that Jackson is automatically entitled to a complete new trial including a retrial of the issue of guilt or innocence. Jackson's position before the District Court, and here, is that the issue of his confession should not have been decided by the convicting jury but should have been determined in the proceeding separate and apart of the body trying guilt or innocence. So far we agree and hold that he is entitled to such a hearing in the state court. But if at the conclusion of such an evidentiary hearing in the state court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and properly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a

new trial, for Jackson has already been tried by the jury with the confession placed before it and has been found guilty." (*Jackson* v. *Denno*, 378 U.S. 394).

Assuming, arguendo but not conceding, that "not involuntary" does not mean "voluntary", in this case there have been two post-*Jackson, supra,* determinations as to voluntariness; as such the *Jackson* standard has been met, the Eighth Circuit must be reversed.[9]

The court has recently reaffirmed this position as to the correct procedure on remand in *Lego* v. *Toomey*, ... U.S. ....., 30 L.Ed.2d 618 (1972).

In *Lego,* this court impliedly approves certain aspects of the Missouri procedure concerning the amount and quality of the evidence to convince a judge that a confession is voluntary (30 L.Ed. 621 [Footnote 1]). Additionally, Missouri law contemplates that the state carries the burden of proving that any confession it offers was not involuntarily obtained, and more than substantial evidence is required to justify finding the confession voluntary.[10] Such factors convince petitioner that the trial court in the instant case made a substantial finding of record that the confession was voluntary.

It appears, then, that after a consideration of the foregoing principles from *Jackson, supra,* and *Lego, supra,* the Eighth Circuit has done little more than engage in a Lewis Carroll exercise of words meaning what I say they mean, when it holds not involuntary does not mean voluntary.

---

9. Indeed, it would appear that even this court may enter a finding on the voluntariness of a confession on review. *Boulden* v. *Holman*, 394 U.S. 478, 480.

10. *State* v. *Gibilterra*, 116 S.W.2d 93. As to the Missouri cases discussing a "prima facie" rule, See *State* v. *Laster*, 293 S.W.2d 303, and cases cited therein.

Consideration should also be given to *Procunier* v. *Atchley*, 400 U.S. 446 (1971). In that case, discussing what criteria entitled a petitioner for habeas corpus to a new hearing on the voluntariness issue, this court stated:

> "But those decisions did not establish that an applicant for federal habeas corpus is entitled to a new hearing on the voluntariness issue, in either the federal or state courts, merely because he can point to shortcomings in the procedures used to decide the issue of voluntariness in the state courts. Our decisions make clear that he must also show that his version of events is true, would require the conclusion that his confession was involuntary."

Petitioner would submit that to be consistent with *Townsend* v. *Sain*, 372 U.S. 293 (1963), and the codification of these habeas corpus criteria in Title 28, U.S.C.A., Section 2254, the court must extend its reasoning in *Procunier* one step further.

As *Townsend* v. *Sain*, *supra*, and Title 28, U.S.C.A., Section 2254, indicate, a federal court may not properly exercise its power in habeas corpus to resolve factual situation absent one of the following findings:

(1) That the merits of the factual dispute have not been resolved in state court;

(2) That the fact finding procedure afforded by the state is not adequate to afford a full and fair hearing;

(3) That material facts have not been developed. No finding of record involving any of the three foregoing tests may be found in the Eighth Circuit's opinion.[11]

11. Petitioner notes that the Eighth Circuit commented "... (t)hat several of Stidham's allegations have not been contradicted in the record." (443 F.2d 1331). Petitioner assumes that it is not the law that rebuttal evidence must be offered to every issue pro and con in a given case before credibility may be determined.

Petitioner must therefore assume that the procedure which the trial court used in the instant case for eliciting the *facts* of coercion, were adequate to afford a full and fair hearing, that the material facts as to coercion were developed, and that the merits of the factual dispute as to coercion was resolved. Such being the case, petitioner would submit that this court should hold that an applicant for federal habeas corpus is not entitled to a new hearing on the coercion aspect of his confession, where he can point to no defect in the manner in which the evidence before the state trial court was gathered, but points only to a defect in the court's ruling on the competency of evidence. Clearly, the converse to the rule announced in *Procunier, supra,* is required.

The theory has been advanced that constitutional decisions of this court should be given retroactive application to all non-final convictions pending at the time of this court's holding, but that those seeking habeas corpus relief should generally be treated according to the law prevailing at the time of their conviction. *Mackey* v. *U. S.*, 401 U.S. 667 (1971) concurring opinion of Mr. Justice Harlan.

If the Eighth Circuit opinion is correct, and petitioner submits that it is not, the issue noted by Mr. Justice Harlan as not having been previously presented to this court (*Mackey* v. *U. S.*, 401 U.S. 686) is here squarely presented.

Simply put, habeas corpus has not traditionally, and should not today, be a forum for the exercise of federal judicial power to apply, collaterally, standards not viable at the time of the original appellate review to this court. Common sense demands finality. It is a concept that the most litigious of prisoner piecemeal adjudicators can un-

derstand. Mr. Justice Harlan is right. *Mackey* v. *U. S.*, *supra*. Mr. Justice Harlan's philosophy should be adopted by this court.[12]

Mr. Justice Harlan's principle of retrospectivity is especially applicable when view is given to the facts in the instant case.

Seventeen years after trial, at which the defendant had a hearing and ruling on the very point before this court, the Eighth Circuit has, on latent reflection, after multiple reviews by the state courts, and successive petitions before the federal district court, said in effect: "In 1971, we think the standard announced in 1964, should have been applicable in 1955." If such states the law in habeas corpus, a new position is required.

Finally, petitioner would note the unusual circumstances by which respondent Stidham's appeal reached the Eighth Circuit after successive filings of petitions for habeas corpus in the United States District Court for the Western District of Missouri. By reference to Appendix G, Appendix H, and Appendix I, it can be seen that on June 25, 1970, the Eighth Circuit granted respondent Stidham's motion to dismiss his appeal. It can further be seen that on September 25th, petitioner filed a successive habeas corpus petition in the United States District Court for the Western District of Missouri, and simultaneous therewith filed a motion to reinstate his appeal in the court of appeals. The Eighth Circuit denied Stidham's motion to reinstate, but the United States District Court

12. Bator, Finality in Criminal Law and Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963); Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgements, 38 U. Chi. L. Rev. 142 (1970). Contra: *Adams* v. *Illinois*, U.S. , 40 L.W. 4255, 4258 (1972), dissenting opinion of Mr. Justice Douglas; Schwartz, Retroactivity, Reliability in Due Process: A Reply to Professor Mishkin, 38 U. Chi. L. Rev. 719 (1966).

for the Western District of Missouri entertained respondent's second petition and in reliance upon its prior order denied issuance of the writ, and considered an additional grounds, that of preliminary hearing, in light of *Coleman* v. *Alabama*, 399 U.S. 1 (1970).

Petitioner recognizes that *res judicata* is not a general rule applied in habeas corpus, but petitioner would submit that there are two issues on this set of facts: (1) The Eighth Circuit was without jurisdiction to entertain the second petition, except perhaps as to the *Coleman* v. *Alabama, supra,* claim; (2) the Eighth Circuit abused its discretion in entertaining the successive petition.

As to the Eighth Circuit's jurisdiction, petitioner would submit that the failure to reinstate respondent Stidham's initial appeal acted as a denial of application for certificate of probable cause pursuant to Rule 22(b), F.R.App.P., Stidham had his day in court and thus the court was without jurisdiction to consider a second appeal.

Petitioner concludes that an abuse of the habeas corpus procedure is seen by the successive nature of respondent's applications, and would particularly note the dismissal of this cause originally before the Eighth Circuit, and the subsequent second filing on the exact issues before the District Court. Petitioner would conclude that pursuant to Title 28, Section 2254(b); *Salinger* v. *Loisel,* 265 U.S. 224 (1924); *Smith* v. *Yeager,* 393 U.S. 122 (1968); and *Sanders* v. *U. S.,* 373 U.S. 1 (1963) the Eighth Circuit abused its discretion in allowing the docketing of petitioner's second appeal in this case.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below must be reversed.

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-224

JAN 2 1972
MICHAEL RODAK, JR., CLERK

HAROLD R. SWENSON, Warden,
Missouri State Penitentiary,

Petitioner,

v.

JAMES WILLIAM STIDHAM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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JAMES WILLIAM STIDHAM,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

I. Did the Court of Appeals err in failing to find that the statement of the accused was involuntary as a matter of law?

Malloy v. Hogan, 378 U.S. 1 (1963)
Davis v. North Carolina, 384 U.S. 737 (1966)
Watts v. Indiana, 338 U.S. 49 (1949)
Clewis v. Texas, 386 U.S. 707 (1967)

Brooks v. Florida, 389 U.S. 413 (1967)
Haynes v. Washington, 373 U.S. 503 (1963)
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Garrity v. New Jersey, 385 U.S. 493 (1967)
Fikes v. Alabama, 352 U.S. 191 (1957)
Townsend v. Henderson, 405 F.2d 324 (6th Cir. 1968)

II. Did the Court of Appeals correctly find that the procedure used in Missouri trial courts in 1955 for testing the competency of a confession did not meet the minimal standards of *Jackson v. Denno*?

Jackson v. Denno, 378 U.S. 368 (1964)
Sims v. Georgia, 385 U.S. 538 (1966)
Lego v. Twomey, Sup. Ct. No. 70-5037 (Jan. 12, 1972)
State v. Gibilterra, 116 S.W.2d 88 (Mo. 1938)
State v. Sanford, 193 S.W.2d 37 (Mo. 1946)
State v. Laster, 293 S.W.2d 300 (Mo. 1956)

III. Did the Trial Court as well as the subsequent reviewing courts fail to make a finding with "unmistakable clarity" that the accused's statement was voluntary?

Jackson v. Denno, 378 U.S. 368 (1964)
Sims v. Georgia, 385 U.S. 538 (1966)
Desist v. United States, 394 U.S. 244 (1968)

IV. Did the United States Court of Appeals properly exercise its authority in allowing Stidham to appeal his second habeas corpus application after an appeal on his first application had been dismissed without prejudice?

Title 28 U.S.C. Section 2253

STATEMENT

While petitioner's statement of the case does not constitute a misstatement of the evidence, it is replete with irrelevant detail regarding the procedural history of this case, and inflamatory descriptions of the "numerous fractures, punctures and wounds" of the victim and the nature of the alleged attack (Pet. Br. 16-19). References to such testimony as that alleging that the victim was "begging, hollering and

pleading for his life" (Pet. Br. 19) have absolutely no bearing on the issues before this Court and appear to be a rather unfortunate attempt to becloud the undisputed factual data pertaining to the alleged confession. The issues before this Court revolve solely around the background and circumstances under which the statement of James Stidham was elicited. Accordingly, respondent will direct himself initially to the undisputed evidence concerning the background information, secondly to the disputed testimony concerning the actual method by which the statement was elicited and recorded and finally to action of the trial court in dealing with the issue of voluntariness.

A. UNDISPUTED EVIDENCE

From May, 1952, until January, 1953, James Stidham was confined with the regular prison population at Missouri State Penitentiary. However, in January, 1953, he was placed in solitary confinement based on charges that he had attempted an escape (A. 610-612). Stidham remained in solitary confinement for approximately 20 months until September, 1954 (A. 610). During the first 18 months, Stidham testified, he was confined in a cell five feet by seven feet with furnishings consisting of a wash basin, toilet and steel bunk with a straw tick as a mattress (A. 611). He stated that the area of his confinement was infested with cockroaches, rodents and pigeons and that the ventilation was so poor that on several occasions he passed out because of the heat (A. 612). Stidham further testified that throughout these 18 months he was denied the opportunity to consult with friends, attorney or priest, was not allowed to converse with persons other than prison guards, and was denied access to recreation, fresh air and religious services (A. 611, 612).

During the last two months, from July 12, 1954, until September 24, 1954, Stidham was confined on "Death Row" under substantially the same solitary confinement conditions he had previously undergone with the exception, he stated,

that on "Death Row" he was not provided with a bunk, but slept on a straw tick on the floor (A. 612, 613). Stidham testified that during the entire 20-month period he was permitted to leave solitary confinement on only one occasion (for a court appearance) and was beaten at least seven times (A. 613).

It was while Stidham was confined on "Death Row," in late September, 1954, that the prison riot occurred, during the course of which Stidham was released from his cell. When Stidham was returned to his cell on September 23, 1954, after the riot had ended, he stated, the entire floor was covered with three to four inches of water and the straw tick had become waterlogged to the extent that the only method by which he could sleep was to sit on the commode (A. 615).

Stidham testified that immediately after being returned to his cell he was questioned about his participation in the alleged murder but denied any knowledge of it (A. 615). For the next several days, he said, he was questioned at length at least 25 times and was threatened with physical harm if he did not admit participation in the alleged murder (A. 324, 616). Stidham testified that during this time he attempted to contact a lawyer by addressing a registered letter to his parents but that the letter was not permitted to be mailed (A. 620). He said he also attempted to obtain a lawyer by bribing several guards, but was not able to do so (A. 620). From the time the riot ended on September 23, 1954, until the morning Stidham was brought before the Cole County Magistrate on September 29, 1954, Stidham stated, he was not provided with food of any kind (A. 621).

The statement in question was elicited on September 27th, three days after the riot had ended and after approximately an hour of interrogation at the "field house" which was located some distance from Stidham's cell on "Death Row" (A. 291, 310, 428). During the interrogation there were present at least six police officers who were wearing side arms (A. 299, 304). Stidham initially denied any knowledge of the alleged murder, but subsequently signed the statement in issue (A. 305, 310).

The circumstances by which he was persuaded to make the statement are disputed and will be treated in the next section, but it is not disputed that Stidham was at no time advised of his constitutional rights (A. 675). It is also undisputed that the statement signed by Stidham is incorrect as to his age (it states that he was 25 when in fact he was 28) (A. 327, 421, 430), his residence (it states that he is from Kansas City although he had never lived there) (A. 676), and his prior convictions (it states that he had three, when in fact he had only one) (A. 616, 674).

Subsequent to signing the statement Stidham testified that he was again placed in solitary confinement in a barren cell (A. 328, 432) and two days later, on September 29th, was taken before the Cole County Magistrate for arraignment on the murder charge (A. 433). At that time he shouted in open court his demand for a lawyer, but was not provided with one, nor was he allowed to call his own attorney (A. 329). He testified that his reason for desiring a lawyer at that time was to obtain an immediate statement from a state witness who had failed to identify him as one of those participating in the alleged murder, and also to examine his physical condition since his body was then "a mass of bruises" and since he had lost 25 pounds of weight during the six-day period since the riot had ended (A. 328, 622). In the absence of counsel a plea of not guilty was entered, however, a grand jury subsequently returned an indictment and the information was dismissed. Stidham was then rearraigned on the indictment and counsel was appointed to represent him. Stidham said he first saw his appointed lawyer about a month later (A. 623).

B. DISPUTED TESTIMONY

The testimony regarding the immediate circumstances under which the statement was elicited on September 27th at the "field house" is quite divergent. Stidham testified that he was placed in a chair, handcuffed behind his back, that a belt was placed behind his ankles and a heavy coat around him

and that he was then questioned about the alleged murder (A. 325, 428). When he denied any involvement, Stidham testified, the officers took a rope, tied it around his cuffed hands and raised him about six inches off the ground (A. 325, 429). He stated that the questioning continued for about 15 minutes while he was suspended in the air, after which he was lowered and told to sign a statement to be dictated to him (A. 326, 429). When he refused, he said, he was again lifted off of the floor and hit with corkball bats (A. 327, 430). He stated that because of his weary condition, and the fact that he was at that time semiconscious, he agreed to sign a statement which was then dictated to him by the officers (A. 327, 430).

The officers present at the September 27th interrogation denied that there were any threats or physical abuse, and contended that Stidham voluntarily admitted to committing the murder with a six-inch kitchen knife (A. 657, 662).

C. TRIAL COURT PROCEEDINGS

During the course of the trial, Stidham's counsel moved the court "to conduct a preliminary examination" and "to inquire into the voluntariness of the statement, and to determine whether the statement was given voluntarily, either the oral or the written statement" (A. 289). The Court replied as follows:

> ". . . and the defendant proposes to show by cross-examination or by its own testimony the involuntariness of the statement?" (A. 289)

The Court in granting the motion for the hearing stated:

> ". . . if the defendant then has any testimony concerning the voluntariness of the confession, he may take the stand or offer such testimony as he wishes to offer, and then at that time the Court will pass upon the admissibility of the statement into evidence, and then the Jury will be recalled, and, of course, parties will have the same opportunity of presenting the same matter before the Jury. With that statement, you may proceed." (A. 291)

Thereafter the evidentiary hearing was held and the Court stated as follows: (at A. 348)

> ". . . it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject, of course, to any attacks as to its credibility by the defendant. The defendant has, of course, the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted so we may proceed with Sergeant Little, as to his identification before the Jury of the statement in question, Exhibit 16 and 16-1.
>
> MR. HENNELLY: In other words, the Court is overruling my motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?
>
> THE COURT: That is right. Mr. Sheriff will you bring the Jury back in?"

Subsequently, both the written and oral statements of Stidham were received in evidence over the objections of Stidham's counsel.

SUMMARY OF ARGUMENT

According to the "Questions Presented" section of petitioner's brief, petitioner takes issue with the decision of the Eighth Circuit on two substantive points pertaining to the admissibility of Stidham's statements under the requirements of *Jackson v. Denno*, 378 U.S. 368, (a) That the law in Missouri at the time of Stidham's trial did not comply with the *Jackson* requirements and (b) That the trial court did not make an affirmative finding of voluntariness as required by *Jackson*. Additionally, petitioner argues that the Eighth Circuit abused its discretion by allowing Stidham to appeal

from the denial of a petition for habeas corpus after he had once voluntarily dismissed an appeal.

In addition to answering these contentions, respondent will show that the only error committed by the Eighth Circuit was its failure to find that Stidham's statement was involuntary as a matter of law. Accordingly, respondent's argument will be addressed first to the voluntariness of the confession, secondly to the *Jackson v. Denno* points raised by petitioner and lastly to the contention that the Eighth Circuit abused its discretion in allowing the appeal.

As to the voluntariness of the statement, this Court has repeatedly held, under conditions analogous to the undisputed evidence in the instant case, that the totality of the circumstances rendered the confession involuntary and inadmissible.

Decisions of the Missouri Courts both prior to and subsequent to the Stidham trial, indicate quite clearly that the procedure then utilized did not meet the requirements of the Fourteenth Amendment as set out in *Jackson v. Denno.*

Neither the trial court, nor any subsequent reviewing court, made a finding with "unmistakable clarity" that Stidham's statement was voluntarily made as is required under the ruling in *Sims v. Georgia.*

A finding that a confession "is not involuntary as a matter of law" is not an actual, reliable and clear cut determination that the confession is voluntary as is required by this Court's holding in *Jackson v. Denno.*

Title 28, United States Code, Section 2253, provided the Court of Appeals with both the authority and the duty to review the denial of Stidham's second petition for habeas corpus.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FAILING TO FIND THAT THE STATEMENT OF THE ACCUSED WAS INVOLUNTARY AS A MATTER OF LAW

The Court of Appeals reviewed the evidence pertaining to the background and circumstances under which Stidham's confession was elicited and concluded as follows: (at A. 771)

> "We believe that the above version of the facts, if true, requires the conclusion that the confession was an involuntary one. See, *Brooks v. Florida*, 389 U.S. 413 (1967); *Watts v. Indiana*, 338 U.S. 49 (1949); *Brown v. Mississippi*, 297 U.S. 278 (1936).
>
> We emphasize that we do not decide or intimate that the allegations are true. It is not the task of the federal court to do so in state habeas corpus matters:
>
> '. . . The appropriate remedy when a federal court finds a *Jackson v. Denno* error in a prior state proceeding is to allow the State a reasonable time to make an error-free determination on the voluntariness of the confession at issue. . . .'
>
> *Sigler v. Parker*, supra at 484.
>
> We only note, as did the United States District Court, that we have examined the transcripts and other relevant materials and have found that several of Stidham's allegations have not been contradicted in the record."

In light of its decision to remand the case for further proceedings, therefore, the court declined to determine whether, as a matter of law, the statement was involuntary. The court did, however, recognize that a portion of the evidence showing involuntariness was uncontradicted. As indicated in the statement of the case, such evidence established that:

> A. Prior to giving a statement, Stidham had been confined in solitary confinement continuously for 20 months (A. 610).

B. The solitary confinement had for the most part been in a cell measuring five feet by seven feet with furnishings consisting of a wash basin, toilet, steel bunk and straw tick in an area infested with cockroaches and rodents, and with ventilation so poor that Stidham passed out on several occasions (A. 611).

C. During the 20-month period of solitary confinement, Stidham was not permitted to converse with persons other than prison guards, nor was he permitted to participate in exercise, recreational or religious activities (A. 612).

D. During the four days prior to giving the statement, Stidham was confined in a cell with several inches of water on the floor and could sleep only by sitting on the commode since his straw tick was waterlogged (A. 615).

E. During the four days prior to giving the statement, he was questioned at length at least 25 times, was threatened with physical harm, and was denied contact with a lawyer (A. 438, 616).

F. From the period beginning four days before the statement was given and ending two days after the statement was given, Stidham had nothing to eat (A. 621).

G. The statement was elicited under surveillance of at least six armed police officers in an isolated "field house" after at least one-half hour of interrogation during which Stidham denied any participation in the alleged murder (A. 304, 305, 618).

H. The signed statement is erroneous in three material respects pertaining to the background of the accused: His age, his residence and his prior convictions (A. 327, 421, 430, 475, 676).

I. After making the statement Stidham was returned to solitary confinement and was arraigned two days later without the benefit of counsel even though he shouted in open court his desire for a lawyer (A. 328, 329, 622).

J. Stidham was at no time either before, during or after the interrogation advised of his constitutional right to remain silent, to have the assistance of counsel, or to terminate the interrogation (A. 675).

Testimony pertaining to many of these facts was elicited at the trial and was uncontradicted. Substantially the same testimony was elicited at the hearing on the motion to vacate several years later and it remained uncontradicted. To this date the State has steadfastly resisted any additional proceedings concerning the voluntariness issue wherein it would have the opportunity to rebut any of the above evidence which could be rebutted. Consequently, we are faced with a situation similar to that in *Sims v. Georgia*, 389 U.S. 404 (1967) in which the Court commented: (at 385 U.S. 406)

> "The state had every opportunity to offer the police officers, whose failure to testify had already been commented upon here to contradict petitioner's version of the events. Its failure to do so when given a second chance lends support to the conclusion that their testimony would not, in fact, have rebutted petitioner's."

Although it is recognized that the strict requirements of the *Miranda* decision are not enforced retroactively, and were, therefore, not applicable to this case, *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Fourteenth Amendment nevertheless required that the statement not be admitted unless it were actually found to be voluntary. As the Court stated in *Malloy v. Hogan*, 378 U.S. 1, 4 (1963):

> ". . . today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897, when, in *Bram v. United States*, 168 U.S. 532, the Court held that "[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in

any criminal case to be a witness against himself.' " Id., at 542. Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, (it) must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." Id., at 542-543; see also *Hardy v. United States,* 186 U.S. 224, 229; *Wan v. United States,* 266 U.S. 1, 14; *Smith v. United States,* 348 U.S. 147, 150. In other words the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. *Haynes v. Washington,* 373 U.S. 503."

The Court has frequently held that in determining whether a confession is voluntary it is necessary to look at all of the attendant circumstances, including mental as well as physical influences. *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Davis v. North Carolina,* 384 U.S. 737 (1966); *Haynes v. Washington,* 373 U.S. 503 (1963); *Blackburn v. Alabama,* 361 U.S. 199 (1960); *Watts v. Indiana,* 338 U.S. 49 (1949); *Chambers v. Florida,* 309 U.S. 227 (1940).

For example, in *Watts v. Indiana, supra,* the accused had been confined for five and one-half days, much of the time in solitary confinement. During this time, he was interrogated by relays of police officers. The Court in holding a confession obtained under such circumstances inadmissible stated: (338 U.S. at 53)

> "Disregard of rudimentary needs of life – opportunities for sleep and a decent allowance for food – are also relevant, not as aggravating elements of petitioners treatment, but as part of the total situation out of which his confessions came and which stamped their character."

* * * * *

> "When a suspect speaks because he is overborne it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and is, therefore, the reverse of voluntary."

Similarly in *Turner v. Pennsylvania,* 338 U.S. 62 (1949), where the accused had been held for five days without contact with counsel or friends and without being advised of his constitutional rights, the Court held that the statement elicited under the circumstances was not admissible.

A case with facts somewhat analogous to those in the instant case is *Davis v. North Carolina, supra.* Davis had been held for sixteen days in solitary confinement in a cell measuring six feet by ten feet, containing a steel bunk, mattress, drinking fountain and commode. In the instant case, the uncontradicted evidence is that Stidham had been confined in solitary confinement for twenty months under conditions far less comfortable than those to which Davis was subjected. The evidence indicated in the *Davis* case that for the sixteen days during which he was held, Davis was seen only by police officers, was subjected to several periods of interrogation and lost some fifteen pounds of body weight. As indicated in the statement of the case, the evidence is uncontradicted as to the existence of similar factors in the instant case, including the defendant's substantial loss of weight (A. 328).

Holding that Davis' confession was inadmissible, the Court addressed itself to each of the above mentioned factors.

As to the solitary confinement:

> "The instruction not to permit anyone access to Davis and not to allow him to communicate with the outside world can mean only that it was the determination of his custodians to keep him under absolute control where they could subject him to questioning at will in the manner and to the extent they saw fit, until he would confess. 339 F.2d 780.

> Moreover, the uncontested fact that no one other than the police spoke to Davis during the 16 days of detention and interrogation that preceded his confessions is a significant factor in the determination of voluntariness." (384 U.S. at 745)

As to the lack of food:

> "We may readily agree that the record does not show any deliberate attempt to starve Davis, compare *Payne v. Arkansas*, 356 U.S. 560 (1958), and that his diet was not below a minimum necessary to sustain him. Nonetheless, the diet was extremely limited and may well have had a significant effect on Davis' physical strength and therefore his ability to resist. There is evidence in the record, not rebutted by the state, that Davis lost 15 pounds, during the period of detention." (384 U.S. at 746)

As to the multiple periods of questioning:

> "The facts established on the record demonstrate that Davis went through a prolonged period in which substantial coercive influence were brought to bear upon him to exort the confessions that marked the culmination of police efforts. Evidence of extended interrogation in such a coercive atmosphere has often resulted in a finding of involuntariness by this Court; e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Fikes v. Alabama*, 352 U.S. 191 (1957); and *Turner v. Pennsylvania*, 338 U.S. 62 (1949). We have never sustained the use of a confession obtained after such a lengthy period of detention and interrogation as was involved in this case.
>
> "The fact that each individual interrogation session was of relatively short duration does not mitigate the substantial coerive effect created by repeated interrogation in these surroundings over 16 days. So far as Davis could have known, the interrogation in the overnight lock-up might still be going on today had he not confessed." (384 U.S. at 752)

Moreover, the Court in *Davis, supra*, while noting that the *Miranda* requirements would not be applied retroactively,

held that the failure to warn Davis of his constitutional rights was a significant factor to be considered in determining whether the confession was voluntary. See also *Haynes v. Washington, supra; Culombe v. Connecticut,* 367 U.S. 568 (1961).

Another case quite analogous to the one in issue is *Clewis v. Texas,* 386 U.S. 707 (1967), in which the Court again viewed the *Miranda* requirements as relevant factors in determining the voluntariness issue even though they were not strictly applied retroactively. The Court in *Clewis* held that the lack of *Miranda* warnings, coupled with a long period of custody, intermittent interrogation, inadequate food and lack of sleep rendered the confession inadmissible.

Still another similar case is *Brooks v. Florida,* 389 U.S. 413 (1967). Brooks, accused of participating in a prison riot, spent fourteen days in a barren punishment cell, during which time he was provided with no clothing and little food. A confession was then elicited and he was returned to his cell for another twenty days. Finding that the confession was involuntary and inadmissible, the Court commented as follows:

> "The record in this case documents a shocking display of barberism which should not escape the remedial action of this court. Accordingly, we reversed the judgment below."

In view of the abundance of pronouncements from the Court condemning as involuntary statements elicited under circumstances similar to those indicated by the uncontested evidence in the instant case, it is difficult to perceive how Stidham's statement can be viewed as voluntary. The lengthy period of solitary confinement, in itself, must have had a substantial impact upon his willpower. While petitioner may argue that such confinement was necessary to the security of the prison, such argument is simply not pertinent to the issue at hand. A similar argument was met by the Court of Appeals in *Townsend v. Henderson,* 405 F.2d 324 (6th Cir. 1968), which involved a prisoner who had been placed in solitary

confinement for participating in a prison riot and who was subsequently interrogated. The accused testified that his cell contained only the most primitive sanitary facilities and a board for a bed, that he was not provided with clothing, and that the only nourishment he had was bread and water. The Court noted that: (at 327)

> "State witnesses did not attempt to describe the conditions of Terry's confinement, so we must accept his testimony on this subject as true. Moreover, since solitary confinement for prisoners is considered additional punishment, it is common knowledge that the solitary cells are not designed for comfort."

Accordingly, the court held that the conditions of confinement in themselves, rendered the confession involuntary. In rejecting the argument that such confinement was necessary to maintain prison discipline, the court stated: (at 328)

> "It has been suggested that Terry had committed a very grave offense and that the maintenance of prison discipline required him to be placed in solitary confinement. Perhaps so, but that is not the question before us. We reach our conclusion in regard to Terry's confession without consideration of his quilt in the riot and without consideration of the methods utilized by prison authorities to maintain discipline. Those methods are not described in this record, except incidentally as they affect the prisoner Terry. The solitary confinement of prisoners as a means of enforcing discipline is a subject for study by penologists and sociologists. But, the admissibility in a judicial proceeding of a confession extracted from a prisoner by his jailer while he is in solitary confinement is a question for the courts. That question is squarely before us here and we hold that Terry's confession should not have been used against him."

Whatever may have been the efficacy of confining Stidham under the conditions described insofar as prison discipline is concerned, such conditions clearly had a substantial coercive effect on the man insofar as his statement is concerned. It is submitted that based on the record before the Court, and

common knowledge of human behavior, no conclusion is possible other than that the statement was a result of coercion. Accordingly, under the decisions cited above, the statement should be held involuntary and the conviction ordered vacated.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT THE PROCEDURE USED IN MISSOURI TRIAL COURTS IN 1955 FOR TESTING THE COMPETENCY OF A CONFESSION DID NOT MEET THE MINIMAL STANDARDS OF *JACKSON v. DENNO.*

In finding that the trial court in the instant case did not affirmatively determine Stidham's statement to be voluntary before submitting it to the jury as required by *Jackson v. Denno,* 378 U.S. 368 (1964), the Court of Appeals looked to the case law in Missouri at the time of the trial and concluded as follows: (A. 767)

> "Our examination of the Missouri case law convinces us that a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary."

The Court then goes on to set out pertinent excerpts from the Missouri cases of *State v. Gibilterra,* 116 S.W.2d 88, 94 (Mo. 1938); *State v. Sanford,* 193 S.W.2d 37, 38 (Mo. 1946), and *State v. Laster,* 293 S.W.2d 300, 304 (Mo. 1956), each of which states explicitly that the question of voluntariness is to be determined by the Jury unless the contrary appears so conclusively that the confession must be held involuntary as a matter of law. Additionally, the Court of Appeals cited the cases of *State v. Bridges,* 349 S.W.2d 214 (Mo. 1961); *State v. Barnett,* 338 S.W.2d 853 (Mo. 1960); *State v. Falbo,* 333 S.W.2d 279 (Mo. 1960); *State v. Statler,* 331 S.W.2d 526 (Mo. 1960); *State v. Phillips,* 324 S.W.2d 693 (Mo. 1959); *State v. Bradford,* 262 S.W.2d 584 (Mo. 1953); *State v. Cochran,* 203 S.W.2d 707 (Mo. 1947); *State v. Ellis,* 193 S.W.2d 37 (Mo. 1946).

It would be unduly repititious to quote at length from the above cases. However, a reading of the Eighth Circuit's opinion, as well as a cursory review of the cases cited will indicate that the Court's position is well taken.

In taking issue with the Appellate Court's conclusion drawn from a review of the above cases, petitioner directs the Court's attention to five cases from the previous century wherein the Missouri Courts simply state that the preliminary question of voluntariness is a matter of law to be determined by the court rather than the jury.[1] Disregarding for a moment the age of these cases as diminishing their validity at the time of Stidham's trial, they nevertheless state nothing of a *requirement* that a judge make a positive determination of voluntariness before submitting the matter to the jury. Petitioner also cites *State v. Wooley*, 115 S.W. 417 (Mo. 1908), and *State v. Wilson*, 122 S.W. 671 (Mo. 1909), for the proposition that the question of "competency of the evidence" was regarded as one for the judge (Pet. Br. 39). Respondent takes no issue with this general proposition, however, neither of these cases says anything of a *requirement* that the judge positively and affirmatively determine a confession to be voluntary before he rules it to be "competent" evidence and submits it to the jury.

While petitioner quotes at length from the opinion in *State v. Tharp*, 64 S.W.2d 249 (Mo. 1933), the quoted portion itself appears to contradict petitioner's argument. The court stated (at 255) and petitioner quoted (at Pet. Br. 40):

> "All the witnesses for the state say the defendant was advised he could have counsel and that whatever he said could be used against him. In these circumstances certainly the trial court did not err in leaving it to the jury to say whether the written confession then made was voluntary or not. . . . yet we think the

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[1]Petitioner cites *State v. Brown*, 73 Mo. 631 (1881); *State v. Hopkirk*, 84 Mo. 378 (1884); *State v. McKenzie*, 45 S.W. 1117 (Mo. 1898); *State v. Patterson*, 73 Mo. 695 (1881), and *Hector (a Slave) v. State*, 2 Mo. 166 (1829).

> proof here was amply sufficient to make it a jury issue whether the confession in the prosecuting attorney's office was voluntary and independent of any alleged influence exerted on the boys in Trenton the preceding evening."

The Missouri court in *Tharp* thereby approves the procedure whereby the trial court defers to the jury where there is conflicting evidence on the question of voluntariness.

Similarly, the opinion in *State v. Gibilterra*, 116 S.W.2d 88 (Mo. 1938), is strangely quoted at length in petitioner's brief (at Pet. Br. 41), although it undercuts petitioner's contention that Missouri procedure has always required the trial judge to make an initial determination of voluntariness. The portion quoted by petitioner reads in part as follows:

> "At the hearing if the evidence is conflicting and substantial the court *may* determine the mixed question of law and fact by weighing the evidence; and if convinced one way or the other he should rule accordingly."
>
> * * *
>
> "On the other hand, *when there is substantial conflicting evidence and the question is close it is better to refer the underlying issue to the jury* than to exclude the confession . . ." (Emphasis added)

The court in *Gibilterra* holds, therefore, that a trial judge is not required to refer the question of voluntariness to the jury in the face of conflicting evidence, but neither is he required to make a determination himself. If "the question is close," he may refer it to the jury. In fact the court recommends that, under such circumstances, it is better to refer the underlying issue of voluntariness to the jury. As the Eighth Circuit noted, the *Gibilterra* opinion goes on to state that the voluntariness of a confession "is a jury question unless it is involuntary character so conclusively appears that it must be held involuntary as a matter of law." (A. 768)

The same judicial mandate appears in *State v. Bradford*, 262 S.W.2d 584 (Mo. 1953), also quoted at length by petitioner: (at Pet. Br. 42, 43)

> "On the other hand, when there is substantial conflicting evidence and the evidence is close, it is better to refer the issue to the jury than to exclude the confession upon the preliminary hearing."

In resting his argument on such pronouncements, it is apparent that petitioner has misconstrued this Court's holding in *Jackson v. Denno*, 378 U.S. 368 (1964). Petitioner argues in effect that if a Missouri court finds that there is substantial conflicting evidence on the issue of voluntariness or that the question is close, and accordingly refers the matter to the jury, then the court has satisfied the requirements of *Jackson*. The decision in *Jackson*, however, places squarely on the trial court[2] the responsibility of making an actual and independent determination as to voluntariness.

In *Jackson, supra*, the Court condemned the New York procedure whereby the trial court conducted a preliminary inquiry into the voluntariness of a confession and excluded it from consideration by the jury only if the evidence was overwhelming as to its voluntariness. Under the condemned procedure, if the evidence presented "a fair question as to its voluntariness as were certain facts bearing on the issue are in dispute or where reasonable men could differ," then the judge was required to refer the issue to the jury. The fallacy of this procedure, the Court said, was that under some circumstances it was impossible to determine how the issue of voluntariness was finally resolved since the jury returned only a general verdict on the question of guilt or innocence. The principle upon which the *Jackson* decision turned is that a defendant is entitled to "a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." Accordingly, the Court held that any procedure utilized:

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[2]It is recognized that *Jackson* permits the determination of voluntariness to be made by any fact finder other than the convicting jury (See 378 U.S. 391 N. 19). The term "trial court" is therefore used in this context to include such other independent fact finders.

> ". . . must, therefore, be fully adequate to insure a *reliable and clear cut determination* of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend" (378 U.S. at 391). (Emphasis added)

In *Sims v. Georgia,* 385 U.S. 538 (1966), the Court was even more explicit in stating the requirement of a "clear cut determination of voluntariness." The Court said: (385 U.S. at 544)

> "Although the judge need not make a formal finding of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with *unmistakable clarity.*" (Emphasis added)

More recently in *Lego v. Twomey,* No. 70-5037 (January 12, 1972), the Court, in holding that the prosecution must prove voluntariness only by a preponderance of the evidence rather than beyond a reasonable doubt, stated again the requirements of *Jackson:*

> "To reiterate what we said in *Jackson:* When a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear cut determination that the confession was, in fact, voluntarily rendered. Thus, the prosecution must prove by at least a preponderance of the evidence that the confession was voluntary."

It is abundantly clear, therefore, that a defendant is entitled to a *determination* as to whether or not the confession is voluntary. This requirement is not satisfied by a mere finding that there is "substantial conflicting evidence" or that "the question is close" so as to permit the judge to submit the issue to the jury. Neither is it satisfied by a finding that the evidence of involuntariness is not so overwhelming as to make the confession "involuntary as a matter of law." The judge must make a *determination* based on the preponderance of the evidence, he cannot pass this duty on to the jury.

A review of the Missouri cases cited by the Court of Appeals makes it equally clear that the Court was correct in stating that under Missouri law "a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary." Consequently, Missouri law, at the time of the trial, did not meet the minimal standards set out in *Jackson v. Denno, supra,* and reiterated in *Sims v. Georgia, supra,* and *Lego v. Twomey, supra.*

The petitioner argues, citing *State v. Washington,* 399 S.W.2d 109 (Mo. 1966), that pre-*Jackson* Missouri procedure was "indistinguishable in legal effect" from the Massachusetts rule approved in *Jackson.* As the Court of Appeals noted, *State v. Washington* was decided after *Jackson* became law and directed itself to a Missouri standard which was different than that in effect in 1955. Moreover, the petitioner has overlooked one critical distinction between the pre-*Jackson* Missouri procedure and the Massachusetts procedure. Under the Massachusetts rule the judge is *required to make a positive determination* of voluntariness before submitting the matter to the jury, while under pre-*Jackson* Missouri procedure he could defer to the jury if the evidence presented a "close question." The Court in *Jackson* comments on the approved Massachusetts procedure as follows: (378 U.S. at 378 N. 8)

> "While no more will be known about the views of the jury than under the New York rule, the jury does not hear all confessions where there is a fair question of voluntariness, but only those which the judge actually and independently determines to be voluntary based on all the evidence. The judge's consideration of voluntariness is carried out separate and aside from the issues of the reliability of the confession and the quilt or innocence of the accused and without regard to the fact the issue may be again raised before the jury if decided against the defendant. *The record will show the judge's conclusions in this regard* and his findings upon the underlying facts may be expressed or ascertainable from the record." (Emphasis added)

The Court then notes (in Appendix A) that Missouri is among those States where it appears "unclear" whether the Massachusetts or New York procedure is used. It is submitted that the United States Court of Appeals for the Eighth Circuit, in the instant case, has now conducted an extensive review and analysis of Missouri case law and has concluded tha the procedure utilized in 1955 was not in compliance with the standards of *Jackson*. It is further submitted that this conclusion is correct in fact and in law and should not be disturbed by this Court.

III. NEITHER THE TRIAL COURT NOR ANY SUBSEQUENT REVIEWING COURT MADE A FINDING WITH "UNMISTAKABLE CLARITY" THAT THE ACCUSED'S STATEMENT WAS VOLUNTARY.

As petitioner correctly notes the holdings of the Court in *Jackson v. Denno, supra*, and *Sims v. Georgia, supra*, provide for two requirements on the question of voluntariness of a confession:

> "1. At some point in the proceedings a hearing on voluntariness must be had on defendant's request.
>
> "2. The judicial determination that a confession is voluntary must appear on the record." (Pet. Br. 48)

As to the second requirement, the Court in *Sims* states that:

> "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." (385 U.S. 544)

The Court of Appeals found that the above requirement was not met in the instant case, and, it is submitted that an analysis of the proceedings supports that conclusion, particularly when the comments of the judge are read in the context of the Missouri case law discussed in the previous section.

Upon the request of defense counsel for a preliminary examination on the issue of voluntariness, the Court inquired:

> "And the defendant proposes to show by cross examination or by its own testimony the involuntariness of the statement?" (A. 289)

The Court thereby implies that it will look to the defendant to carry the burden of proving involuntariness.

In granting the defense request the trial court stated:

> ". . . if the defendant then has any testimony concerning the voluntariness of the confession, he may take the stand or offer such testimony as he wishes to offer, and then at that time the court will pass on the admissibility of the statement into evidence, and then the jury will be recalled and, of course, parties will have the same opportunity of presenting the same matter before jury. With that statement, you may proceed." (A. 291)

Aside from the obvious pre-disposition indicated by the above statement, it will be noted that the Court proposed to "pass on the admissibility of the statement into evidence," not to make a determination as to its voluntariness. As noted in the previous section, Missouri cases then held that a statement was "admissible" if there was a "close question" as to its voluntariness.

At the conclusion of the evidenciary hearing, the Court stated: (at A. 348)

> ". . . (I)t is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted . . .

"MR. HENNELLY (Defendant's counsel): In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?

"THE COURT: That is right. . . ."

As it had previously proposed to do, the Court did not determine the voluntariness issue but simply ruled that the statement should be presented to the jury for its determination.

The only reference to a ruling on voluntariness was the gratuitous inquiry of defense counsel as to whether the Court was overruling his motion to find the statement involuntary "as a matter of law." The Court answered in the affirmative—that it was overruling his motion and did not find the statement involuntary *as a matter of law*. Such a ruling is understandable in light of the Missouri Rule that voluntariness was a jury question "unless its voluntary character so conclusively appears that it must be held to be involuntary as a matter of law." *State v. Gibilterra*, 116 S.W.2d 88, 94 (1938). However, it is not sufficient to satisfy the requirements of *Jackson* and *Sims* which require a positive determination of voluntariness and the requirement of *Lego* which holds that voluntariness must be found by at least a preponderance of the evidence.

Petitioner's argument that to find that a confession is "not involuntary as a matter of law" is to make a positive finding that it is "voluntary" ignores the respective weights of evidence required for each such finding.

A finding that a confession is "not involuntary as a matter of law" simply means (under the Missouri cases cited) that the evidence of involuntariness is not overwhelming. It may be that there is "substantial conflicting evidence," or that "the question is close." However, the finding that a confession is "voluntary" as required by *Jackson*, *Sims* and *Lego* means that the judge has weighed the evidence and has found that a preponderance of the evidence indicates voluntariness. There is no indication in the record of the instant case that the trial court made such a finding and, as noted, the clear

implication is that the trial court was simply following the procedure prescribed by Missouri case law.

Petitioner further argues that determinations of voluntariness were made by the Missouri Circuit Court at the hearing on Stidham's motion to vacate and by the Supreme Court of Missouri on appeal from denial of that motion. He concludes, therefore, that "there have been two post *Jackson* determinations as to voluntariness" (Pet. Br. 54). However, a review of the post trial proceedings referred to, indicates that in neither the hearing nor the appeal did the court rule directly on the factual issue of voluntariness. The State court considering Stidham's post trial motion refused to make an independent finding of voluntariness stating: (at A. 686)

> "As to subparagraph b concerning the averment that 'the overwhelming evidence was that the statement was involuntary because of coercion exerted on movant' this contention was raised and profusely litigated in *State v. Stidham, supra,* and the Court finds is no longer open to question here. *State v. Statler, supra; Crawford v. State, supra.*
>
> "It should be noted that the evidence concerning the issue of voluntariness was greatly conflicting and was to be resolved by the trial court in the first instance and the jury in the second having regard to the credibility of the witnesses. This issue should now be considered closed, and this Court finds it to be so."

Similarly, on appeal of the case, the Supreme Court of Missouri in *State v. Stidham,* 449 S.W.2d 634 (1970), did not itself make a finding that the statement was voluntary, but relied on its contention that the original trial court had made such a finding. The Supreme Court merely stated that the trial judge's "finding" was supported by the evidence. Nowhere does the Missouri Supreme Court make an *independent* finding of voluntariness.

Accordingly, it is submitted that neither the trial court nor any reviewing court has yet made a finding with "unmistakable clarity" that the statement was, in fact, voluntary.

As incidental to his argument that the *Jackson* requirements were met, petitioner asks the Court to hold first that habeas corpus does not lie to review the coercion aspect of a confession, and secondly that *Jackson* standards should not be applied retroactively. These points were not raised in the petition for writ of certiorari or in the "Questions Presented" section of petitioner's brief, and, therefore, are not subject to review. Rule 40(1)(d)(2). However, they are moot in any event. In *Desist v. United States*, 394 U.S. 244, 250, No. 15 (1968), this Court included *Jackson v. Denno, supra*, with *Gideon v. Wainwright*, 372 U.S. 335, and *Griffin v. Illinois*, 351 U.S. 12, in listing those constitutional decisions which require retroactive application, and in each of the numerous decisions cited in the first section of this argument the issue of voluntariness reached this Court through its review of action on a petition for habeas corpus.

In view of the foregoing, it is submitted that the Court of Appeals did not err in finding that the requirements of *Jackson v. Denno, supra*, have not yet been satisfied in the instant case. Unless this Court finds, as urged in the first section of respondent's argument, that Stidham's statement was involuntary as a matter of law, then the Court should affirm the action of the Court of Appeals in remanding the case for the necessary determination.

IV. THE UNITED STATES COURT OF APPEALS DID NOT ABUSE ITS DISCRETION BY ALLOWING STIDHAM TO APPEAL HIS SECOND HABEAS CORPUS APPLICATION AFTER AN APPEAL ON HIS FIRST APPLICATION HAD BEEN DISMISSED WITHOUT PREJUDICE.

Petitioner takes issue with the Court of Appeals' action in docketing Stidham's appeal, pointing out that the Court had previously refused to reinstate an appeal from a previous habeas corpus application which appeal had been dismissed without prejudice on Stidham's own application. In support of his argument, petitioner cites 28 U.S.C. 2254 (b); *Salinger v. Loisel*, 265 U.S. 224 (1924); *Smith v. Yeager*, 393 U.S. 122 (1968); and *Sanders v. United States*, 373 U.S. 1 (1963).

It is difficult to perceive how any of these authorities apply to petitioner's argument.

Title 28 U.S.C., Section 2254(b), pertains to the exhaustion of state remedies prior to filing an application for writ of habeas corpus in federal courts. Certainly there can be no contention that respondent has failed to exhaust state remedies. There is nothing under the section cited which could in any way be interpreted to limit the jurisdiction of an appellate court to review a decision of a district court.

Similarly, the decisions cited have absolutely no application to an appellate court's jurisdiction under these circumstances.

The Court in *Salinger v. Loisel, supra,* held that *res judicata* does not apply in habeas corpus proceedings, but that the District Court on second application may take into consideration the fact that a previous application has been denied. *Smith v. Yeager, supra,* and *Sanders v. United States, supra,* both reaffirmed the common law principle that *res judicata* has no application to habeas corpus proceedings, and in all three of the above cases the Court held that petitioner was in each instance entitled to a hearing on his second application. None of the opinions was addressed to the jurisdiction of the Appellate Courts to review decisions of the District Courts, and it is submitted that under Title 28 U.S.C. Section 2253 (quoted at P. 3 Petitioner's Brief) the Court of Appeals has the authority and duty to review any final order of a District Judge in a habeas corpus proceeding in which a Certificate of Probable Cause has been issued.

It is possible that petitioner is referring to Title 28 U.S.C. Section 2244 (b) when he argues that there has been an abuse of procedure in Stidham's successive habeas corpus petitions. However, that section states merely that a federal court "need not" entertain an application for writ of habeas corpus, if a previous application premised on the same issues has been denied. As the Court notes in the above cited cases, the decision to entertain the petition under such circumstances lies within the sound discretion of the court. In the instant case, the District Court did, in fact, entertain the

motion, but denied it. Clearly, the Appellate Court had both the jurisdiction and the duty to review the District Court's action.

CONCLUSION

For the reasons set forth in section one it is submitted that the Court should find the statement of the accused to be involuntary as a matter of law and should, therefore, reverse the judgment and conviction. However, in the event the Court does not so find, then it is submitted that for the reasons set forth in the remainder of this brief, the United States Court of Appeals for the Eighth Circuit properly assumed jurisdiction of this case and correctly applied the law set forth in *Jackson v. Denno, supra,* and *Sims v. Georgia, supra,* in finding that there had not been a determination made "with unmistakable clarity" that the accused's statement was voluntary and, therefore, the action of the Court of Appeals in reversing and remanding the case should be affirmed.

Respectfully submitted,

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St. Louis, Missouri
Attorney for Respondent

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SWENSON, WARDEN *v.* STIDHAM

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-224. Argued October 11, 1972—Decided December 7, 1972

During respondent's trial for murder he challenged the voluntariness of his confession. A full evidentiary hearing was held outside the jury's presence, following which the trial court held the confession admissible. After affirmance of respondent's conviction on appeal, respondent sought state post-conviction relief. The Missouri Supreme Court reversed the denial of respondent's motion to vacate, and an evidentiary hearing was held by the St. Louis Circuit Court on the voluntariness issue. That court concluded that the trial judge himself had found the confession voluntary and thus complied with *Jackson* v. *Denno*, 378 U. S. 368. The Missouri Supreme Court affirmed, and held additionally that respondent had been given a new evidentiary hearing by the St. Louis court and that his confession had again been found to be voluntary. Respondent then sought federal habeas corpus. The District Court determined that *Jackson* v. *Denno* had been satisfied. The Court of Appeals, concluding that the trial judge, as permitted by then-prevailing state law, had not made the voluntariness finding himself but had submitted the issue to the jury, reversed and held that respondent was entitled to a new hearing. *Held:* The trial court's *Jackson* v. *Denno* error, if any, was remedied by the constitutionally adequate evidentiary hearing given respondent on the voluntariness issue by the St. Louis court, which the Missouri Supreme Court upheld after concluding from its independent examination of the record that the confession was voluntary. The Court of Appeals therefore erred in holding that respondent was entitled to still another voluntariness hearing in the state court. Pp. 4–7.

443 F. 2d 1327, reversed and remanded.

WHITE, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–224

Harold R. Swenson, Warden, Petitioner, *v.* James William Stidham.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[December 7, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case has a long and tortured history and is not yet concluded. At this juncture the question is whether, absent further state court proceedings to determine the voluntariness of his confession, petitioner's 1955 conviction for murder is vulnerable to attack under the Fourteenth Amendment as construed and applied in *Jackson* v. *Denno*, 378 U. S. 368 (1964).

In July 1955, petitioner Stidham was convicted of first-degree murder of a fellow inmate during a riot. He was sentenced to life imprisonment. He was represented by experienced counsel who challenged his confession when it was offered at trial. A full evidentiary hearing outside the presence of the jury was held. Stidham's testimony as to the relevant circumstances surrounding his confession was in sharp conflict with that of the officers. His claim was that he had been subjected to gross physical abuse; the officers denied the claim. At the conclusion of the hearing, the trial judge admitted the confession with the following ruling:

> "THE COURT: 16 and 16–1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by

> the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted, so we may proceed with Sergeant Little, as to his identification before the Jury of the statement in question, Exhibit 16 and 16–1.
>
> "MR. HENNELLY: In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?
>
> "THE COURT: That is right. Mr. Sheriff will you bring the Jury back in?"

Stidham's conviction was affirmed on appeal in *State* v. *Stidham*, 305 S. W. 2d 7 (Mo. 1957). A motion to vacate was denied and the denial affirmed, 403 S. W. 2d 616 (Mo. 1966). On a second motion to vacate, however, the Missouri Supreme Court ordered an evidentiary hearing in accordance with its newly revised post-conviction procedures. *State* v. *Stidham*, 415 S. W. 2d 297 (Mo. 1967). Among the issues to be heard and decided was whether Stidham's conviction was infirm under *Jackson* v. *Denno* and the Due Process Clause of the Fourteenth Amendment.

In compliance with this order, an evidentiary hearing was held on December 5, 1968, before Judge Godfrey in the Circuit Court of the City of St. Louis. The court heard oral testimony from both Stidham and witnesses offered by the State; it also had before it the transcript of the prior proceedings as well as certain stipulations of fact by the parties. In April 1969, the court issued its opinion, with findings of fact and conclusions of law,

denying the relief requested. With respect to the confession issue, the court first concluded that the judge at Stidham's trial had himself found the confession voluntary and had thus complied with the rule of *Jackson* v. *Denno*. As to voluntariness *vel non*, the court said:

> "As to subparagraph b concerning the averment that 'the overwhelming evidence was that the statement was involuntary because of coercion exerted on movant,' this contention was raised and profusely litigated in State vs. Stidham, supra, and the Court finds it no longer open to question here. State vs. Statler, supra; Crawford vs. State, supra.
>
> "It should be noted that the evidence concerning the issue of voluntariness was greatly conflicting and was to be resolved by the trial court in the first instance and the jury in the second having regard to the credibility of the witnesses. This issue should now be considered closed, and this Court finds it to be so."

This judgment was affirmed in the Missouri Supreme Court. *State* v. *Stidham*, 449 S. W. 634 (Mo. 1970). Agreeing first that the judge at Stidham's trial had with sufficient clarity found the confession voluntary and admissible in evidence, the court then held that in any event Stidham had been given a new evidentiary hearing and his confession again determined to be voluntary by the circuit court. In its view, the circuit court had "found, as had the previous court, that the oral and written confessions were voluntary . . . ." Based upon its own extensive analysis of the record, the Missouri Supreme Court also concluded that the finding of voluntariness was "overwhelmingly supported and procedurally and factually the cause meets all the requirements of the federal cases and there has been no invasion of due process." 449 S. W. 2d, at 644.

Stidham then resorted to federal habeas corpus, presenting several issues including the confession matter. The United States District Court, Western District, Missouri, after having examined the full record of the state court proceedings, denied the petition without a hearing but with an opinion holding that there had been no violation of *Jackson* v. *Denno* because the state trial judge had satisfactorily found the confession voluntary prior to submitting it to the jury. 328 F. Supp. 1291 (1970).

The Court of Appeals reversed by a divided vote. 443 F. 2d 1327 (CA8 1971). Its understanding of Missouri law at the time of Stidham's trial was that the trial judge was not required himself to make a finding on voluntariness but was permitted to submit the issue to the jury in the first instance. As the Court of Appeals saw it, this is precisely what the trial court did: the finding that the confession was not involuntary as a matter of law was not an independent assessment of voluntariness but merely a statement that the issue was one for the jury. Because in its view there had never been a reliable judicial determination of the facts and of the ultimate issue of voluntariness, either at trial or in later proceedings, the Court of Appeals reversed the judgment and remanded the case to the District Court, it being contemplated that the State would be allowed "reasonable time to make an error-free determination on the voluntariness of the confession at issue . . . ." *Sigler* v. *Parker*, 396 U. S. 482, 484 (1970). We granted certiorari, 404 U. S. 1058 (1972).

We are first asked to hold that the Court of Appeals erred in concluding that Stidham's trial judge failed to comply with the requirement of the Fourteenth Amendment as construed in *Jackson* v. *Denno* that there must be a judicial finding of voluntariness before a challenged confession is submitted to the jury. The State's posi-

tion is not without force, and begins with the proposition that the Court of Appeals was too much influenced by what the trial judge might have done under the Missouri law prevailing at the time and too little by what he actually did. Even if the controlling rule permitted submission of a challenged confession to the jury without the judge's own determination of voluntariness, that rule, the argument goes, did not prevent him from resolving the disputed issues of fact preliminary to admitting the confession into evidence. Obviously, it is said, Stidham's trial judge took the latter course, for (1) he held a full evidentiary hearing outside the presence of the jury, a wholly unnecessary and time-wasting procedure if he was merely to determine if there was a disputed issue as to voluntariness that should be submitted to the jury and (2) having heard the evidence, he denied the motion to suppress and found the confession not involuntary as a matter of law, a conclusion necessarily indicating that the judge resolved the disputed issues against Stidham, for had he believed him rather than the police, it is inconceivable that the confession would have been submitted to the jury. Finally, it is urged that the Missouri courts and the Federal District Court construed the trial judge's ruling as equivalent to an affirmative finding that the confession was voluntary and that the Court of Appeals should have accepted this interpretation of the proceedings in the lower courts.

The issue, then, is not free from doubt, but it is evident that we need not decide it in this case, for the Court of Appeals erred in another respect that requires reversal of its judgment.

Even if the trial procedure was flawed with respect to the challenged confession, *Jackson* v. *Denno* does not entitle Stidham to a new trial if the State subsequently provided him an error-free judicial determination of the voluntariness of his confession—error-free in that the de-

termination was procedurally adequate and substantively acceptable under the Due Process Clause. *Jackson* v. *Denno*, 378 U. S. 368, 393–396 (1964). Here, the Missouri courts, in connection with Stidham's second motion to vacate his sentence, unquestionably furnished a procedurally adequate evidentiary hearing and, the outcome was adverse to Stidham. But it is said that the St. Louis Circuit Court considered itself bound by prior proceedings and never independently determined that Stidham's confession was voluntarily given. Reliance is placed on Judge Duncan's statement that the evidence was conflicting, that the issue was for the trial court and jury and that "the issue should now be considered closed, and this Court finds it to be so."

This contention is in the teeth of the Missouri Supreme Court's prior order reopening the entire matter and directing the trial judge to hold a full evidentiary hearing and then "to decide all issues of fact and questions of law . . . ." 415 S. W. 2d, at 298. The Missouri Supreme Court later thought its mandate had been complied with and expressly read the Circuit Court as having "found, as had the previous court, that the oral and written confessions were voluntary . . . ." 449 S. W. 2d, at 644. What is more, the Supreme Court carefully reviewed the record, noting that "the testimony in contraction of Stidham's uncorroborated claims was all but overwhelming," *id.*, at 641, and that the patrol, police and prison officers—"all these witnesses, all produced by the State, categorically or implicitly refuted all of Stidham's claims of mistreatment, either physical or mental." *Id.*, at 643–644. The Court's conclusion was that the finding of voluntariness was "overwhelmingly supported" and that there had been no invasion of due process. *Id.*, at 644.

We are not inclined to disagree with the Missouri Supreme Court's interpretation of the Circuit Court's opinion and judgment. We also hold that as between

the two courts the *Jackson* v. *Denno* error, if any, was sufficiently remedied.

This, of course, does not end the matter. A state prisoner is free to resort to federal habeas corpus with the claim that, contrary to a state court's judgment, his confession was involuntary and inadmissible as a matter of law. Neither the District Court nor the Court of Appeals reached this issue. We are asked to decide the question here but it is not our function to deal with this issue in the first instance.

The judgment of the Court of Appeals for the Eighth Circuit is reversed and the cause is remanded for further proceedings consistent with this opinion.

So ordered.